CONTENTS.

	PAGE
Statement of Facts	2
The nature and effect of the Act of 1862	3
That act constituted a contract	5
The act of 1885 does not alter or repeal the Act of 1862	6
The Legislature could not, as against complainant, constitutionally alter or repeal the Act of 1862	8
The ordinance in question, having been passed in disregard of the requirements of the Act of 1862, is not due process of law	16
Complainant is not estopped from claiming the rates authorized by the Act of 1862	18
The rates fixed by the Supervisors do not allow just compensation, even independently of the Act of 1862	21
Six per cent. per annum has been fixed by the California law as the lowest reasonable compensation	21
Complainant's rates are reasonable as to the public	22
The actual, reasonable, and necessary cost of the canal and works is the proper basis upon which the rates should be fixed	27
The rates fixed by the Supervisors are unreasonably low, even if the valuation upon which they were fixed be taken to be correct	40
Complainant has not been guilty of any unjust discrimination	57
Reply to Appellants' Points	66
There is no defect in parties defendant	66
Complainant has no adequate remedy at law	70
The Act of 1862 is constitutional	71
The cost of complainant's canal was sufficiently proved	75
That canal was not extravagantly constructed	76
Complainant's farming operations are immaterial	77
Assessors' valuations are not evidence of value	78
Revenue not increased under ordinance	78
Complainant's voluntary reduction of rates is immaterial	79
Complainant's rates are not unjust to consumers in Stanislaus	79

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1903.

No. 80.

THE COUNTY OF STANISLAUS ET AL.,
Appellants,

VS.

THE SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY,
Appellee.

BRIEF FOR APPELLEE.

We have not been favored with appellants' brief; and, finding that this case is likely to be reached for hearing at a very early day, we are compelled to prepare our brief without any information as to the argument to be made for appellants. Before the completion of this brief, however, their counsel furnished us an outline of the points they intend to make, which we will consider so far as we understand them.

We will discuss the points made in the lower court, prefacing them with a very brief statement of such of the facts as we suppose material to be here stated; and we will then add some remarks on points which counsel inform us they intend to urge, but which were not made in the lower court.

STATEMENT OF FACTS.

This is a suit in equity brought to obtain a decree that a certain ordinance of the Board of Supervisors of the defendant county, assuming to fix the rates for water furnished by complainant to the inhabitants of that county, is void, under the Constitution of the United States, as depriving complainant of its property without due process of law and denying to it the equal protection of the laws, and also to enjoin the enforcement of that ordinance.

The grounds on which complainant bases its right to relief are two: (1) that complainant is entitled, by express contract with the State, to much higher rates than those so fixed by the Supervisors, and (2) that, even apart from that contract, the rates fixed by the Supervisors do not and cannot afford to complainant any fair, just, or reasonable return upon the value of its property used and useful in supplying water to the public, nor any fair, just, or reasonable compensation for its services rendered to the public in that behalf. The particular facts on which these claims are based are fully stated in our argument.

Defendants controvert these contentions, and also allege that complainant has been guilty of such unjust discrimination in the conduct of its business as to deprive it of any

right to equitable relief. They also, as we are informed, intend to urge in this Court, for the first time, that the bill does not contain proper parties defendant, and that complainant has an adequate remedy at law.

The court below rendered a decree as prayed for in the bill, and the defendants have appealed.

Upon the assurance by counsel for appellants that certain points made by defendants in the court below would not be urged by them on this appeal, we consented, at their request, that the testimony bearing on those points might be omitted in printing the record; and therefore, by stipulation of parties (*Transcript*, pp. 464-5,) that testimony has not been printed. We shall, therefore, not refer to those points.

ARGUMENT.

I.

THE PROVISIONS OF SECTION 3 OF THE CALIFORNIA STATUTE OF MAY 14, 1862, CONSTITUTED A CONTRACT WITH COMPLAINANT. THE ACT OF MARCH 12, 1885, DID NOT ATTEMPT TO ALTER OR ABROGATE THAT CONTRACT; BUT, IF IT DID, SUCH ALTERATION OR ABROGATION IS VOID UNDER THE PROVISIONS OF SECTION 10 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES, AS IMPAIRING THE OBLIGATION OF A CONTRACT.

On May 14, 1862, the legislature of California passed an act (*California Stats.* 1862, 540) authorizing the incorporation of companies for the purposes of "the construction of "canals, for the transportation of passengers and freights, "or for the purpose of irrigation or water-power, or for the

"conveyance of water for mining or manufacturing pur-
"poses, or for all of such purposes." Section 3 of that act provided:

> "Every company organized as aforesaid shall have power, and the same is hereby *granted,* * * * to establish, collect, and receive rates, water rents, or tolls, which shall be subject to regulation by the Board of Supervisors of the county or counties in which the work is situated, *but which shall not be reduced by the Supervisors so low as to yield to the stockholders less that one and one-half per cent. per month upon the capital actually invested.*"

The complainant was incorporated in 1871, under the provisions of that act.

On March 12, 1885, the legislature passed an act (*Cal. Stats.* 1885, 95) providing, among other things, for the fixing, by the Board of Supervisors of a county, of the rates to be collected "by any person, company, association, or cor-
"poration, for the sale, rental, or distribution of any appro-
"priated water, to any of the inhabitants of such county." Section 5 of that act provided as follows:

> "Said Boards of Supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations * * * shall be not less than six nor more than eighteen per cent." [upon the value of the property used in supplying the water.]

Section 31 of article IV of the Constitution of the State (in force at the time of the passage of said Act of 1862) reads as follows:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

On these matters, we contend: (1) That the provisions of section 3 of the Act of 1862 constitute a contract with every corporation formed under that act, the stockholders of which invested capital therein with which works for the supplying of water were constructed or acquired: (2) That the act of 1885 does not attempt to alter or repeal those provisions; and (3) if that act can be construed as attempting such alteration or repeal, it is inoperative as against a corporation performing the conditions of the former act, before the passage of the latter one.

1. That such an act as that of 1862 constituted a contract is firmly settled by the decisions of this Court.

Gordon v. *The Appeal Tax Court*, 3 How. 133;
State Bank v. *Knoop*, 16 How. 369;
Bridge Proprietors v. *Hoboken Co.*, 1 Wall. 116;
The Binghamton Bridge, 3 Wall. 51;
New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650, 670;
Los Angeles v. *Los Angeles Water Co.*, 177 U. S. 558;
Stearns v. *Minnesota*, 179 U. S. 223;
Detroit v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368.

To paraphrase the language of Mr. Justice Miller in *Bridge Proprietors* v. *Hoboken Co., supra,* (p. 146,) we may say:

> "Without this, they would not have invested their money in building the canal, which was then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. On the faith of this enactment they invested the money necessary to construct the canal. These acts and promises, on the one side and the other, are wanting in no element necessary to constitute a contract."

2. That portion of the Act of 1862 which declared that the right of the corporation to fix the rates for the water supplied by it should be subject to regulation by the Board of Supervisors, was, of course, not a contract. That right of the State existed without any assent on the part of the corporation. It was the limitation upon that right which constituted a contract. By that limitation the State pledged its faith, for a valuable consideration, that it would not do anything to prevent the corporation from receiving a return of eighteen per cent. per annum on its investment.

This contract, however, was made only with corporations organized under that act, and which, while it was in force, invested capital thereunder. In 1873, that act was superseded by the Civil Code of the State, which made complete provision for the formation of corporations, omitting any such provision as is here in question. By section 288 of that Code it was enacted that no corporation theretofore formed should be affected by the Code,

"but the laws under which such corporations were "formed and exist are applicable to all such corpora- "tions, and are repealed subject to the provisions of "this section."

When the Act of 1885 was passed, there were therefore two classes of corporations which might be affected by its provisions:—those formed under the Act of 1862, and which were entitled, by contract, to charge rates which would yield 18 per cent. per annum on their investment; and those formed under the Code, to which no particular rates were guaranteed.

When, therefore, the legislature, in 1885, passed this general act for the regulation of water-rates, which applied to all corporations, and as well to all natural persons, and provided generally that the rates should be fixed within a maximum limit of 18 per cent. per annum, and a minimum limit of 6 per cent., that act cannot be construed as intended to allow the Supervisors to reduce the rates below the maximum limit, in the case of a corporation then entitled, by contract, to that rate. To so construe that statute would violate two cardinal principles: that repeals by implication are not favored, and that, whatever the *power* of the legislature may be, it cannot be presumed to have *intended* to violate its solemn contract. Nothing less than clear and express language, or an irresistible implication, can justify such an interpretation.

It therefore appears to us that the Act of 1885 should be construed as giving this discretion to the Supervisors only in cases where the State had not previously made such a

contract, and that where there was such a contract, this Act required them to fix the maximum rate.

3. But, however that may be, the legislature did not possess the power to abrogate the contract in question.

We understand the position of the appellants to be that the provision of the State Constitution which we have quoted confers that power upon the legislature; and we are not aware that they claim that such a power would otherwise exist.

In determining the effect of that section of the State Constitution, two questions are to be considered: How far such a power as is here claimed can be lawfully exercised without violating section 10 of Article I of the Constitution of the United States; and whether this provision of the State Constitution does itself attempt to confer such power.

(*a*) It is well settled by this Court that, however broad may be the terms of a State constitution or statute reserving the right to amend the charter of a corporation, that power is not without limit. Notwithstanding such a reservation, the vested rights of the corporation are as inviolable as in other cases; nor can such a power be so exercised as to destroy the grant.

Shields v. *Ohio*, 95 U. S. 319, 324-5;
Holyoke Co. v. *Lyman*, 15 Wall. 500, 519;
Sinking Fund Cases, 99 U. S. 700, 720;
Close v. *Glenwood Cemetery*, 107 U. S. 466, 476;
N. Y. etc. R. Co. v. *Bristol*, 151 U. S. 556, 567;
U. S. v. *Union Pacific R. Co.*, 160 U. S. 1, 33, 36-7;

Lake Shore etc. R. Co. v. *Smith,* 173 U. S. 684, 690, 698.

The same doctrine has been declared by the Supreme Court of California.

Johnson v. *Goodyear Mg. Co.,* 127 Cal. 4, 17-18.

Upon this principle, the courts, in every case which has fallen within our observation, have held that such a reservation does not confer upon the legislature the right to alter or revoke such a contract as the one here in question,—certainly not, so long as the State retains the consideration, or continues to enforce, as against the corporation, the stipulations on the part of the latter.

Comrs. v. *Navigation Co.,* 79 Ky. 73;
Detroit v. *Plank Road Co.,* 43 Mich. 140;
Miller v. *N. Y. & Erie R. Co.,* 21 Barb. 513, 517;
Com. v. *Essex Co.,* 13 Gray, 239, 253;
In re Parrott, 1 Fed. Rep. 481, 485, 513;
People v. *O'Brien,* 111 N. Y. 1, 36, 44, 51;
Ball v. *Rutland R. Co.,* 93 Fed. Rep. 513;
Hill v. *Glasgow R. Co.,* 41 Fed. Rep. 610, 616;
Ohio v. *Neff,* 52 Ohio St. 375, 406;
Orr v. *Bracken Co.,* 81 Ky. 593, 596;
Lothrop v. *Stedman,* 13 Blatchf. 134;
Sage v. *Dillard,* 15 B. Mon. 340;
Stearns v. *Minnesota,* 179 U. S. 223.

This conclusion is in accord with the reasoning in the following cases, in which, however, this point was not involved:

Los Angeles v. *Los Angeles Water Co.*, 177 U. S. 558;
Detroit v. *Detroit Citizens' St. Ry Co.*, 184 U. S. 368.

This proposition applies with especial force to such a contract as this, when made between the State of California and a canal company organized under the laws of that State. Under those laws, the right to flowing water is a public use, and the right to take it for sale or distribution is a franchise, which can be exercised only by authority of law. A corporation, formed to sell or distribute water, must furnish the water to all who apply, and can retain its powers only on that condition. It therefore does not hold the water which it collects and supplies, or the plant which it uses for its collection and distribution, in absolute ownership. It must, so long as it retains that property, continue to perform this public duty; and when it ceases to perform it, its rights cease. From the very nature of the property, and these limitations on its use, the corporation cannot convert it to any other use; and therefore, when its franchise ceases, its property is lost to it,—its investment is substantially gone.

San Diego Water Co v. *San Diego*, 118 Cal. 556, 567, 568-9;
Price v. *Riverside etc. Co.*, 56 Cal. 431;
McCrary v. *Beaudry*, 67 Cal. 120;
Merrill v. *Southside Irr. Co.*, 112 Cal. 426.

Such being the law of California, it is apparent that the attempt, if attempt there was, to repeal section 3 of the Act

of 1862, was a repudiation by the State of the contract on its part, while retaining the consideration it received, and while continuing to hold the corporation bound to a performance of its covenants, on pain of forfeiture of all its rights. When the stockholders of this corporation, upon the faith of this promise by the State, invested their capital in these works, they parted with it irrevocably, and put it under the sole control of the State. For this property, thus placed at its disposal,—indeed, transferred to it,—the State promised a certain compensation. That compensation it is, by every principle of justice and equity, bound to render, so long as it holds that property. Yet it not only insists on holding that property, while denying the agreed compensation, but it requires the corporation to continue to perform those duties which it contracted to perform only for that consideration. We submit that the Constitution of the United States interposes an insuperable obstacle to such action.

(*b*) In examining this provision of the State Constitution, one consideration should be first noted. That provision does not authorize the legislature (in terms, at least) to alter or repeal the *charter* of a corporation. It prohibits the formation of private corporations by special act, but authorizes their formation "*under*" (not *by*) "general laws", and then provides that *those general laws* may be altered from time to time or repealed.

The general laws so referred to are merely statutes providing for the *formation* of corporations. As all legislation is presumed to act only *in futuro*, it is not apparent how the mere repeal of a general Act which authorized the for-

mation of corporations, and prescribed the method of their formation, can affect an existing corporation formed under that Act. After the repeal, no *new* corporation can be formed; but can it be said that an existing corporation is thereby dissolved?

This question has never, so far as we are aware, been definitely passed upon by any court. It was discussed, though perhaps not necessary to the decision, by the Court of Appeals of New York, in the case of *People* v. *O'Brien,* 111 N. Y. 1, 44-45. The court there points out the distinction between an authority to repeal a *statute* providing for the *formation* of corporations, and an authority to dissolve a *corporation* formed under that act. The former power, but not the latter, was expressly conferred by the constitution of that State; while the latter power was conferred by a statute. The court, in discussing the question, said (p. 45):

> "It seems to us that those provisions relate to different subjects, viz.: The repeal of laws, and the annulment of charters formed under such laws; and that *the power to do one, does not naturally or properly include the power to do the other.* Certainly the repeal of a law authorizing corporations, would not destroy organizations formed under it, nor would the annulment of a charter affect the law under which it was created. Neither does it seem reasonable to suppose, while taking away the power of the legislature to create corporate bodies, the Constitution intended to confer power to destroy them, thus enabling them to accomplish indirectly, that which they were precluded from doing directly. It must be assumed that the

framers of the Constitution, as well as the legislature, used the language employed by them intelligently and according to its common and customary signification, *and when they spoke of the annulment and repeal of acts and laws alone, did not intend to embrace charters as well.* These two subjects have frequently been the occasion of legislative action; and since the restriction upon the powers of the legislature to grant special charters, there is no reason to suppose that they did not use the language employed in its *literal* sense, and especially so when both subjects were immediately within the contemplation of the law makers."

The reasoning so outlined applies equally, of course, to the power to amend or alter; and it appears to us, for those reasons, that the California Constitution confers upon the legislature no power to alter or repeal the charter of a corporation, and no power on the subject except to alter or repeal laws for the formation of corporations.

If this construction be correct, this provision of the State constitution can not affect the present case.

(*c*) But, even if that construction is not correct, we submit that, for other reasons, the same result must follow. Even if the amendment or repeal of a general act providing for the formation of corporations, does work a corresponding alteration or abrogation of the charter of a corporation formed under it, yet it cannot be deemed that the constitution authorizes anything further. Though the charter may be amended, it cannot be presumed that the framers of the constitution intended that such amendment should relate to other matters than those mentioned in conferring the power.

Whatever things in the statute to be amended properly relate to the formation of corporations, including, doubtless, the internal as well as the external organization of a corporation, its methods of doing business, and the like, are subjects of amendment. But, if the statute contains other provisions, not relating, in any way, to the formation of corporations, the mere fact that those provisions are contained in the same statute, will not bring them within either the language or the spirit of this constitutional authority. If they constitute a contract, they *cannot* be amended or repealed.

Thus, suppose that an act for the formation of banking corporations, should contain a provision that every bank so incorporated should deposit in the State treasury a certain sum of money as a guaranty fund, which money should be subject to the use of the State, and for which the State should pay interest at the rate of five per cent. per annum. Suppose further that a corporation formed under that act should make the required deposit. Can the constitutional provision in question be construed as authorizing the legislature to enact that that deposit shall thereafter bear only four per cent. interest? Certainly, there is nothing in the *words* of that section of the constitution giving any such power. Giving the widest latitude of construction, we cannot suppose that any one would contend that such a matter is one relating to the formation of the corporation. To suppose that the statesmen who framed, and the people who adopted, that Constitution, intended to authorize such a flagrant breach of the public faith, is to impute something

which no court would be justified in imputing, in the absence of clear and unmistakable language.

Of precisely such a nature is section 3 of the Act of 1862, before quoted. By that section, the legislature, without guaranteeing to the stockholders a fixed income on the money contributed by them to the public use, did nevertheless agree that the State should not so exercise its power of regulating rates as to *prevent* them from realizing that income. That contract was no part of the formation of the corporation, nor even germane to that subject. It presupposed, of course, the existence of a corporation to be a party to it; but, in all other respects, it was such a contract as might as well have been made with a natural person. To hold that the power to abrogate this contract, after its complete execution by the corporation and its stockholders, was intended to be conferred upon the legislature by the State Constitution would be to enlarge the meaning of the words used, solely in order to work an injustice. In face of the *presumption* that *no* law was intended to produce an unjust result, no such construction is permissible.

We therefore submit that, even if the State Constitution could, without violating the Constitution of the United States, have authorized the legislature to abrogate this contract, while retaining the consideration, no such power was, in fact, conferred by the Constitution of California.

II.

THE BOARD OF SUPERVISORS, IN THE ORDINANCE IN QUESTION, DID NOT ALLOW TO COMPLAINANT THE INCOME PROVIDED BY THE ACT OF 1862, AND DID NOT, IN FIXING THE RATES, AT ALL TAKE INTO CONSIDERATION THE CAPITAL INVESTED UNDER THAT ACT. THAT ORDINANCE, THEREFORE, WAS NOT DUE PROCESS OF LAW.

1. It was proved, without contradiction, that, before the passage of the Act of 1885, the stockholders of the complainant corporation had actually contributed *not less than* $914,825, *in money*, to its capital stock (pp. 62-3); and that the construction of the canal and works of complainant actually cost *not less than* $798,429.61. (Complainant's Exhibit 12, page 445; Stipulations, pages 457, 459.)

Eighteen per cent. on $798,429.61 would be $143,717; to which amount at least complainant was entitled under the Act of 1862. The rates so fixed by the Board of Supervisors (though applying only to one county, and complainant having been able to maintain its rates in two other and larger counties) produced, for the two years following the passage of this ordinance, a net income of only $72,285,—or only $36,142 per annum. (Complainant's Exhibits 3 and 11, pages 402-404.) The latter amount is also subject to considerable deduction, on account of the fact that, after the passage of this ordinance, complainant constructed (p. 84) a new canal, at a cost of $85,877.82, by which new land was brought under irrigation, and the income thereby increased.

It is therefore beyond question that this ordinance denies to complainant the rights granted to it by the Act of 1862.

2. The Board of Supervisors acted on the theory that the present value of complainant's canal and works, as measured by what it would now cost to replace them, was the sole matter to be considered in fixing the rates; and it therefore did not at all take into consideration the original cost. The facts in that regard are these:

The testimony before the Board as to the cost of replacement, showed it to be $312,358.

The original cost was proved before the Board, without contradiction, to have been, as we have stated, not less than $798,429.61; and there was no evidence or claim that that amount was in any way extravagant or improper.

The Board, without other evidence, determined the value to be $337,000.

These facts are shown by the stipulations at pages 457 and 459, and the testimony of the witness Goodwin at pages 187 *et seq.*

These facts justify the finding of the court below (p. 50) that the Board of Supervisors did not give any consideration to the original cost of these works, and therefore none to the capital invested under the Act of 1862. Whether or not the Board was bound to take that matter into consideration, apart from the Act of 1862, is a question which we shall discuss under another head. It is sufficient to say here that, if we are correct in saying that the Act of 1862 created a binding contract, which has not been lawfully

repealed or amended, the Board was bound to fix the rates according to the capital so invested. As it wholly disregarded that duty, its action was not due process of law.

III.

THE COMPLAINANT IS NOT ESTOPPED FROM INSISTING ON ALL THE PROVISIONS OF THE ACT OF 1862.

The court below held that the provisions of the third section of the Act of 1862 constituted a contract, the obligation of which the State was not competent to impair, and that, indeed, the Act of 1885 was in no respect inconsistent with those provisions. (Pp. 44-46.) But that court further held (pp. 50-51) that, while the complainant was entitled to the benefit of so much of the Act of 1862 as made the capital actually invested the basis for fixing rates, it had, by its conduct, waived the right to an income of one and one-half per cent. per month. That view was based on the fact that, for more than twenty-five years, complainant had fixed its own rates, which were at no time so high as to yield that amount of income. We submit that this view of the law is not a correct one.

This question was considered by this Court in *Lake Shore etc. Ry. Co.* v. *Smith,* 173 U. S. 684, and decided in favor of our position. In that case the Court held that an act of the legislature compelling the company to sell certain thousand-mile tickets was, for certain reasons, unconstitutional. It was claimed on behalf of the State that the company, by its own action in voluntarily selling such tickets, was estopped from objecting to the statute. The Court said (p. 697):

"It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. *What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do.* Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional *burdens* upon the company."

The case of *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558, presented this question in a much stronger form than in the present case. The company there relied upon a contract precisely similar to the one on which we are now relying. Notwithstanding that contract, the city, in seventeen successive years, passed ordinances fixing lower rates than those to which the company was entitled under the contract. The company collected the rates so fixed, without attempting to resist the ordinances. Finally, the company contested an ordinance passed in the eighteenth year, on the ground that it was a violation of the contract. The Court said (p. 579):

"Acquiescence in a regulation which, all things considered, may not have been injurious, does not preclude a contest of that which is injurious. It must be remem-

> bered that the contract did not forbid all regulation, but only regulation beyond a certain limit. There was no concession of a power to go beyond that limit, but constant protest against it; and when its exercise did go beyond that limit, producing injury not balanced by other considerations, the right to restrain it would naturally be, and, we think, could legally be, exerted."

The present case is much more favorable to complainant. This is the first time that the Supervisors have attempted to fix or regulate complainant's rates at all; and complainant at once proceeded, by this suit, to restrain the enforcement of the ordinance, as violative of the contract. We submit that, under such circumstances, complainant's rights have in no way been affected by its past voluntary action, based upon lenity toward its consumers, or other business reasons.

Before leaving this point, we desire to state explicitly the attitude of complainant as to the Act of 1862. The rates established and, before this ordinance, collected by complainant, are capable of yielding an income of only about six per cent. per annum on the investment. Yet complainant has no desire to raise those rates, and will be entirely satisfied with rates yielding six per cent. But this ordinance undertakes to reduce the rates to so low a point that, as we shall show under the next head, the gross revenue of complainant will most probably be insufficient to pay the necessary running expenses, and cannot, by any possibility, yield a net income of more than one and one-half per cent. per annum on the lowest possible estimate of the investment. To such a reduction we will never submit, if there is any legal redress possible. In order that such unjust and confiscatory

rates shall not be imposed on us, and only for that purpose, we insist on our rights under the Act of 1862. We shall not, in the future, any more than in the past, voluntarily fix rates yielding more than six per cent. But if, in order to prevent the State from compelling us to accept *less,* it is necessary to insist upon our legal *right* to receive eighteen per cent., then we must do so, however reluctantly, by every lawful means within our power.

IV.

EVEN INDEPENDENTLY OF THE ACT OF 1862, THE RATES FIXED BY THE ORDINANCE IN QUESTION ARE SO LOW AS NOT TO AFFORD TO COMPLAINANT ANY JUST COMPENSATION, OR, INDEED, ANY COMPENSATION.

In considering this question, it will be seen that there are two important particulars in which this case differs from any other which has been decided by this Court; and those matters should first receive attention.

1. One question which has always presented great difficulty, and which, we think, has never yet been authoritatively answered, is whether a court is competent to decide how small a compensation can be allowed, under the power to regulate rates, without violating constitutional requirements. Some learned and experienced judges have suggested that the rate of interest on money is a matter subject to legislative discretion, and that, therefore, in the absence of legislative action, it may be impossible for a court to say what would be the lowest reasonable rate. Some judges

have even gone so far as to say that the judicial function, in this class of cases, is exhausted when it is once ascertained that *some* compensation, however small, has been allowed. In the present case, however, that question cannot arise.

The legislature of California has, by a general law, (*Cal. Civil Code,* § 1917,) fixed the lawful rate of interest, in the absence of express contract, at seven per cent. per annum. Section 5 of the Act of 1885, before referred to, (*Cal. Stats.* 1885, 95,) in authorizing the Board of Supervisors to fix annual water-rates, expressly directs that "said rates shall "be equal, reasonable, and just, both to such * * *cor- "porations and to said inhabitants," and that the Board shall, as near as may be, so fix them "that the net annual "receipts and profits shall be not less than six nor more than "eighteen per cent."

By this legislation, which is the only authority to the Supervisors to fix rates at all, the legislature has enacted that six per cent. is the lowest rate of compensation which would be reasonable and just. That enactment is conclusive on the question, at least as against the State and the County; and we submit, therefore, that any rates fixed by the Supervisors which will not allow of substantially that income, do not give the compensation which the Constitution requires.

2. In another particular, a great practical difficulty has been experienced in this class of cases, though the *law* on the subject is well settled. It is beyond question that the reasonableness of any given rate is to be determined, not merely by ascertaining what would be proper in view of the situation of the company, but by considering also what

would be just to the consumers. A rate which would afford to the company no more than a fair return for the use of its property, might yet be greater than the consumers could reasonably afford to pay. Indeed, it has even been suggested that there may be circumstances in which the company would not be constitutionally entitled to any compensation whatever, in view of the inability of the members of the public to pay a rate which would allow any compensation. However that may be, it is settled that the rate should be reasonable as to the consumers, as well as to the company. This principle has necessarily caused great difficulty, in many of the cases, in determining whether a given rate is, in fact, reasonable or otherwise; but that difficulty does not exist in the present case. If such a thing can ever be established by evidence, it was proved beyond contradiction, in this case, that the rates established by complainant, and which the Supervisors are now seeking to reduce, are entirely reasonable to the consumers,—indeed, that they could well afford to pay much higher rates.

The testimony on that subject was as follows:

The defendants produced the testimony of five persons, (pp. 254-5, 264, 273-4, 285, 294-5,) who stated that, *in their opinion,* the rate of $2.50 per acre per annum for the irrigation of alfalfa, which was the rate charged by complainant, was more than the farmers could afford to pay. Neither of these witnesses testified to any *fact* whatever in support of his opinion; and complainant seasonably objected to that testimony, on the ground that it was a mere conclusion, which could be drawn only by the court from the whole evi-

dence, and to which no witness could be permitted to testify. We still insist on those objections.

On the other hand, complainant called twelve witnesses, all of whom were farmers engaged in raising alfalfa, and consumers of water from plaintiff's canal, and five of whom had signed the petition to the Supervisors for a reduction of complainant's rates, in response to which petition the Supervisors had passed the ordinance in question. These witnesses testified as to the *facts* showing the usual and ordinary profits realized from the cultivation of alfalfa, irrigated from complainant's canal, and paying the rate of $2.50 so charged by complainant. They stated, in detail, the items of expense, the amount of crops produced, the prices obtained for those crops, and everything necessary to determine this question. This testimony will be found at pages 314 to 325, 327 to 338, 339 to 341, 342 to 357, 361 to 377. It was substantially accordant, and showed an average net profit in raising alfalfa, paying complainant's full rate, of $20.54 per acre per annum, or over 20 per cent. per annum on $100, the highest price per acre which defendants claimed that the land cost.

In order to present this testimony to the Court in a compact form, we here insert the following tabular statement of it, which we presented to the court below:

Annual Profit in Raising Alfalfa.

Witness.	Cost of putting in crops per acre.	Cost of annual maintenance per acre.	Annual cost of applying water.	Cost of harvesting, etc., per ton.	Average crop in tons per acre.	Average price per ton.	Value of extra pasturage per acre per annum.
Nicholas Bibby	$ 5 00	$.....	$0 75	$ 0 87½	9	$.....	$.....
C. W. Wood	10 00	0 00	0 10	1 00	7½	.....	1 00
Geo. A. Fink	.....	1 00	.....	1 00	8	4 00	.....
Chas. H. Fink	.....	.....	0 15	0 87½	7	4 50	.....
S. O. Crittenden	7 50	0 25	.....	1 00	.....	.....	.....
S. A. Smith	9 00	0 50	.....	1 25	8	4 00	.....
Jno. H. Edwards	10 00	0 75	.....	1 00	8	4 00	.....
H. L. Coombs	7 00	0 37½	1 00	1 00	8	.....	.....
W. H. Devoe	.....	.....	.....	.....	7	5 00	.....
Guy Kilburn	10 00	1 00	0 75	1 00	7½	4 00	.....
E. W. Crow	6 50	1 00	0 75	1 00	.....	3 50	.....
Frank Winter	6 50	0 62½	0 50	1 00	7	4 00	1 00
	$71 50	$5 50	$4 00	$11 00	77	$33 00	2 00
	Div. by 9	Div. by 9	Div. by 7.	Div. by 11.	Div. by 10.	Div. by 8	Div. by 2
	7 94	0 61	0 57	1 00	7.7	4 12	1 00
	Div. by 10						
	0 80						

Recapitulation.

Expenses.

Cost of putting in (averaged on basis of re-seeding every 10 years)	$ 0 80
Cost of annual maintenance	0 61
Cost of applying water	0 57
Cost of water	2 50
	$ 4 48

Receipts.

7.7 tons hay at $4 12	$31 72	
less $1 per ton for harvesting	7 70	$24 02
Pasturage		1 00
Gross receipts		$25 02
Deduct expenses		4 48
		$20 54

Or 20 per cent. per annum on $100.

The explanation of that table is as follows:

In each case, we have presented the view most favorable to defendants. The first column shows the cost of preparing the land and putting in the crop. As some of the witnesses testified that this had to be done anew every ten years, we have divided the average cost by ten. At the foot of this column (as in each other column) we have shown the average of the testimony by adding the amounts together and dividing the total by the number of witnesses. The second, fourth, fifth, and sixth columns explain themselves. The third column shows the cost of irrigation,—that is, the cost of applying the water to the land,—and is exclusive of the cost of the water. The seventh column embraces the testimony of two of the witnesses, who stated that, after the removal of the crops of hay, some valuable pasturage was habitually obtained.

This tabulation is confined to the raising of alfalfa for hay; for, although most of the witnesses stated that much alfalfa is used solely for pasturage, they also stated that that was done because that course was deemed the more profitable one.

As to the cost of the land, J. T. Crow, the most intelligent of the defendants' witnesses, testified (pp. 272-3) that it would average from $60 to $70 per acre. As, however, some of defendants' witnesses put it as high as $100, we have taken that amount as most favorable to defendants, though we believe it to be much too high.

From the evidence thus outlined, it is apparent that it cannot be seriously contended that the rates established by

complainant are unreasonable to the consumers. It is certainly a matter of common experience, which a court must be presumed to know, that a net annual profit of 20 per cent. on the investment is far beyond the usual return of any ordinary kind of business; and therefore a rate which permits such a profit cannot be said to be unreasonably high. And it surely does not lie in the mouths of the defendants to make such a claim, while they are asserting that an annual return of only six per cent. on the actual investment is more than complainant is entitled to receive.

3. We are then brought to the question of what is the proper basis upon which rates may lawfully be fixed, by public authority, for a corporation of the character of complainant. In one form or another, such questions have several times been brought before this Court; but, in accordance with its traditional and wise custom, it has steadily declined to lay down general rules beyond the necessities of the particular case. Some principles, however, have been established; and these should be understood, before inquiring how far they should be applied or qualified in this case.

In *San Diego L. & T. Co.* v. *National City*, 174 U. S. 739, which is practically the latest case on the subject, the Court said (p. 757):

> "The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary

to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."

The difficulty in the present case arises from the proper application of the above words: "the reasonable value of " the property *at the time it is being used for the public.*" The defendants broadly claimed, in the court below, that that language means that the sole basis for fixing rates is the present value of complainant's canal and works, *meas-*

ured by the amount which it would now cost to replace them. On the other hand, our contention was and is that, at least in the case of a canal company in California, the proper basis is the *original actual cost* of that property, if that cost was a fair and necessary one, expended in good faith and without waste or extravagance,—deducting therefrom, if necessary, any depreciation which the property has since undergone, rendering it less fit to subserve the public use.

We submit that defendants' contention is wholly untenable; and that our position is (*a*) fully supported by general principles, (*b*) rendered necessary by complainant's position under the law of California, and (*c*) entirely consistent with the Act of 1885, under which these rates were fixed.

(*a*) In the cases in which this Court has used substantially the above language, on which the present controversy arises, it has also pointed out the reason why the *original cost* may not *always* be the test of value. Thus, in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, the Court (p. 412) applied the following tests:

> "That the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road."

And, in speaking of cases where the fixing of unremunerative rates might be justified, the Court said:

> "There may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss."

So, in *Smyth* v. *Ames,* 169 U. S. 466, the Court said (p. 544):

> "If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization."

And, as we have shown, in *San Diego L. & T. Co.* v. *National City, supra,* the Court used similar language.

The reasons so suggested by the Court are undoubtedly valid reasons, and, we submit, the only valid reasons for rejecting, in any particular case, the original cost as the basis upon which rates ought to be fixed, if otherwise fair to the public. In each of those cases, the Court expressly held that the original cost was one of the things which must be "considered" in fixing rates; and we are unable to understand how a body, exercising functions which are, in substance if not in form, judicial, can be required to consider a matter which it is authorized to arbitrarily reject in making up its decision.

We therefore submit that the decisions of this Court are entirely consistent with, if they do not even necessarily lead

to, the conclusion that, subject to fairness to the consumers, the rates should be so fixed as to allow a reasonable income on the money actually expended in construction, *unless* that amount of money was extravagantly or unnecessarily, or fraudulently expended.

(*b*) But, however this may be as to some corporations, justice imperatively demands that such should be the rule in the case of a canal company under the law of California.

We have already, under another head, called attention to that law, and the situation of a canal company thereunder; and it will be sufficient here to quote from the case there referred to,—*San Diego Water Co.* v. *San Diego,* 118 Cal. 556. In that case, an opinion was written by Justice Van Fleet, and concurred in by Justices Henshaw and McFarland. Each of the other four members of the court filed a separate opinion, in which a different conclusion was reached as to certain matters. But neither of those latter opinions questions the correctness of the statement, in the opinion of Justices Van Fleet, Henshaw, and McFarland, of the California law as to water companies; and that opinion is therefore authoritative on that point. As, however, the conclusion reached in that opinion was not concurred in by a majority of the court, that opinion can not be regarded as an authority in support of that conclusion. But we submit that the reasoning of that opinion is unanswerable; and, as the other members of the court did not attempt to answer or criticize that reasoning in any way, but contented themselves with stating their own conclusions, without giving their reasons in support of them, we think we may, not im-

properly, suggest that that opinion expresses the only view consistent with justice and constitutional principles. As the question is one arising under the Constitution of the United States, decisions of a state court are not binding on this Court, and should be weighed only according to the intrinsic value of the reasons brought forward in their support.

We therefore quote here so much of that opinion as relates to that subject,—not, as we have said, as authority, but as expressing what we believe to be the true rule on the subject:

> "This brings us, then, to the question whether the findings support the judgment. They show that the total receipts of the plaintiff from the rates fixed by the council would be and were insufficient to pay plaintiff's actual and necessary operating expenses, together with the interest on so much of its bonded indebtedness as was necessarily and properly expended by it in the construction of its plant, necessarily and actually used for the supplying of the water here in question—indeed, would fall short more than $11,000 of paying those charges. No circumstances requiring such a loss were found, and the finding that these actual charges were necessarily and properly incurred in the legitimate exercise of the business of furnishing water to the city negative the existence of any such circumstances. It is clear that under the rule laid down by the supreme court of the United States in *Reagan* v. *Farmers' Loan etc. Co.*, 154 U. S. 362, 412, that court would hold those rates to be so unreasonable and unjust as to require the court to set them aside. The decision in that case, however, is not in all respects satisfactory; and, after a careful examination of all the many cases on this subject,

we are unable to discover that any consistent or adequate rules controlling the exercise of the governmental power of fixing rates have yet been judicially laid down. The subject is one of extreme complexity, and its inherent difficulties have been increased rather than diminished by the numerous decisions in which it has been discussed. We think, however, that a consideration of the real nature of the power conferred by our constitution will afford a sufficient solution of the question.

"It is apparent that the water company does not own the water which it collects and supplies, or the plant which it uses to collect and distribute that water, in the same sense in which a man is said to own his house or his farm. By the very nature of the use to which it is applied, the company has devoted that property to a public use. Having once undertaken to perform that public duty, it must continue to perform it, and must carry on its business under the lawful regulations of the government. In effect the state may be said to have appropriated the water and the plant to public use. For that appropriation it is bound to make just compensation, and it has provided for such compensation by requiring the municipal authorities to fix just and reasonable rates at which the water is to be furnished to and received by the consumers. Since the state has 'taken' the use of this property, it is bound to provide a just compensation for that use, and article XIV of the constitution must be construed as providing for that just compensation.

"The question of what is just compensation in such a case is, we think, in all respects analogous to the question which arises in every case of appropriation under the power of eminent domain; and it may be reduced to

the formula that the public must pay the actual value of that which it appropriates to the public use. In determining such value three, and we believe only three, methods are possible: 1. Either by ascertaining what the property could be sold for (its market value); or 2. By ascertaining what it would cost to replace it; or 3. By ascertaining the revenue it is capable of producing. In cases like the present, however, neither the first nor the second method can be resorted to. The judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been and are being made at ascertainable prices. But such property as this is not so sold, at least, not often enough to furnish a fair criterion; and the very fact of governmental regulation would necessarily control the price. Until the rates are fixed no one can say how much the property would sell for, and therefore that price cannot be ascertained as a basis for fixing those rates.

"The second method is entirely inapplicable to property of this kind. The construction of municipal waterworks is a matter of growth. It is necessary in common prudence, on the one hand, to construct the works of such capacity as to satisfy the needs of the growing city, not only at the moment, but within the near future; and, on the other hand, not to extend them so much as to cast an unnecessary burden on the stockholders, or the present consumers. As such works are a necessity to the city, they must keep pace with, and to some extent anticipate, its growth. When constructed they stimulate to that extent the progress of the city, and tend, like all conveniences, to lower the general cost of production of all things. It results that at least the first water

system in any city occupies the position of a pioneer. At any expense the works must be constructed, and usually no reward can be realized by the constructors until some time has elapsed. In the mean time, as the city grows, in part by reason of this very supply of water, the facility of constructing works of all kinds is increased, and the cost of such construction diminished. It would, therefore, be highly unjust to permit the consumers to avail themselves of the plea that at the present time similar works could be constructed at a less cost, as a pretext for reducing the rates to be paid for the water. The reduced expense, if it be reduced, is due in part at least to the very fact that the city has been provided at the cost of the water company with increased facilities for doing business.

"But it is said that those who enter upon any business enterprise undertake the risk of being undersold by those who, coming later into the field, have the advantage of a cheapening of construction. But this is not an ordinary business enterprise. Those who engage in it put their property entirely into the hands of the public. Having once embarked it is beyond their power to draw back. They must always be ready to supply the public demand, and must take the risk of any falling off in that demand. They cannot convert their property to any other use, however unprofitable the public use may become. They have expended their money for the benefit of others, and subjected it to the control of others. That money has, in effect, been taken by the public; and the public, while refusing to return that money, cannot be heard to say that it no longer has need for all of it.

"Nor would it, on the other hand, be just to the consumers to require them to pay an enhanced price for the

water, on the ground that it would now cost more to construct similar works. Such a contingency may well happen; but to allow an increase of rates for such reason would be to allow the water company to make a profit, not as a reward for its expenditures and services, but for the fortuitous occurrence of a rise in the price of materials or labor. The law does not intend that this business shall be a speculation in which the water company or the consumers shall respectively win or lose upon the casting of a die, or upon the equally unpredictable fluctuations of the markets. For the money which the company has expended for the public benefit it is to receive a reasonable, and no more than a reasonable, reward. It is to be paid according to what it has done, and not according to what others might conceivably do. In effect, the bargain between the company and the public was made when the works were constructed; and this matter is to be determined according to the state of things at that time.

"We must then have recourse to the third standard of value—the revenue which the property is capable of producing. At the first blush there might seem to be a difficulty in applying this standard, for the revenue received by the company will be absolutely controlled by the rates fixed, and no revenue can be collected except upon rates so fixed. This difficulty has led one of the counsel in this case, in a singularly able and ingenious argument, to contend that the rates must be so fixed as to enable the company to obtain precisely the revenue which it would realize if the rates were not regulated by the public at all. To this proposition we cannot assent. The whole history of municipal regulation conclusively shows that its principal purpose was always to diminish what were rightly or wrongly believed to be

exorbitant charges. The theory of its application has always been that it is necessary to restrain the proprietors of what have been called 'virtual monopolies' from imposing extravagant and unreasonable tariffs for the use of their facilities. Whether the system be well conceived or not, whether it accords with the theory of free government, are not questions with which we have to do. It is sufficient that the law recognizes that there is a standard by which just compensation may be measured, and that it is intended to prevent that measure from being exceeded.

"What that standard is, as applied to the present case, we think not difficult of ascertainment. As we have said, it is not the water or the distributing works which the company may be said to own, and the value of which is to be ascertained. They were acquired and contributed for the use of the public; the public may be said to be the real owner, and the company only the agent of the public to administer their use. What the company has parted with, what the public has acquired, is the money reasonably and properly expended by the company in acquiring its property and constructing its works. The state has taken the use of that money, and it is for that use that it must provide just compensation. What revenue money is capable of producing is a question of fact, and, theoretically at least, susceptible of more or less exact ascertainment. Regard must be had to the nature of the investment, the risk attendant upon it, and the public demand for the product of the enterprise. It would not, of course, be reasonable to allow the company a profit equal to the greatest rate of interest realized upon any kind of investment, nor, on the other hand, to compel it to accept the lowest rate of remuneration which capital ever obtains. Comparison

must be made between this business and other kinds of business involving a similar degree of risk, and all the surrounding circumstances must be considered. An important circumstance will always be the rate of interest at which money can be borrowed for investment in such a business; and, where the business appears to be honestly and prudently conducted, the rate which the company would be compelled to pay for borrowed money will furnish a safe, though not always conclusive criterion of the rate of profit which will be deemed reasonable. In ordinary cases, where the management is fair and economical, it would be unreasonable to fix the rates so low as to prevent the company from paying interest on borrowed money at the lowest market rate obtainable; and, even then, some allowance or margin should be made for any risk to which the company may be exposed, over and above the risk taken by a lender.

"This being so, the existence of the bonded indebtedness on which so much stress has been laid, and which has seemed to present so difficult a problem in some of the cases, must be disregarded. That fact, indeed, it seems to us, can never be important, except as entitling the holders of the bonds, as parties in interest, to be heard in actions like the present. Evidently, no distinction can be made between those who construct the works with their own money and those who do so with money borrowed from others. In either case the money actually invested is the basic criterion of the revenue to be allowed. * * *

"It should, of course, be said that it does not follow that in every case the company will be entitled to credit for all of its current expenditures, or to receive a compensation based on the entire cost of its works. Reckless and unnecessary expenditures, not legitimately in-

curred in the actual collection and distribution of the water furnished, or in the acquisition, construction, or preservation of so much of the plant as is necessary for that purpose, cannot be allowed. Nor can the investment on which the company is entitled to base its compensation be held to include property not now actually employed in collecting or distributing the water now being supplied, however useful it may have been in the past, or may yet be in the future. It is the money reasonably and properly expended in each year in collecting and distributing the water which constitutes the current expenses which may be allowed; and it is the money reasonably and properly expended in the acquisition and construction of the works actually and properly in use for that purpose, which constitutes the investment on which the compensation is to be computed."

We do not care to add anything to the reasoning contained in that opinion, but submit it as our argument on this point.

(*c*) The view for which we are contending is entirely consistent with the provisions of the act of 1885. This is sufficiently shown in the opinion of the court below (pp. 44-5); to which we will merely add that, even if that act is capable of another construction, the former should be adopted, as most consonant with justice and, therefore, with the presumed intention of the legislature.

V.

EVEN IF THE AMOUNT FIXED BY THE SUPERVISORS SHOULD BE TAKEN TO BE THE TRUE VALUE OF COMPLAINANT'S PROPERTY, YET THE RATES FIXED BY THE BOARD WILL ALLOW NO JUST COMPENSATION EVEN UPON THAT VALUATION.

In this case, we have the advantage of the fact that more than two years elapsed after these rates were fixed, before the taking of the testimony; and we were therefore able to lay before the court the actual result of the operation of these rates, so far as they were in operation.

On the other hand, however, a most serious difficulty arises here, which has never before arisen in any case. Section 2 of the act of 1885 reads as follows:

> "The several Boards of Supervisors of this State * * * are hereby authorized and required to fix and regulate the maximum rates at which any * * corporation, having or to have appropriated water for sale, rental, or distribution, in each of such counties, may and shall sell, rent, or distribute the same."

Complainant's canal heads in the County of Fresno, where it diverts its water from the San Joaquin River; and it thence runs, through the Counties of Fresno and Merced, into the County of Stanislaus,—a distance of about 70 miles. In each of those counties, complainant supplies water, from this canal, to a large number of consumers. The rates in question were fixed by the Board of Supervisors of Stanis-

laus County, and applied only to water furnished to consumers in that county.

It is very doubtful whether this act applies to such a canal as this; and that question has never been decided. As it is a question which ought, if possible, to be first decided by the courts of the state, we shall assume, merely for the purposes of this argument, that that act was intended to apply to such cases.

But, in order that that act could constitutionally so apply, it would be necessary that its provisions should be such as to enable justice to be done in cases such as this. For that end, this act provides no machinery whatever; and, indeed, there is nothing in the act to indicate that such a case as this was within the contemplation of the legislature. If this act does apply to such a case, then the Board of Supervisors of each of these counties is authorized to fix the rates for water supplied from this single canal, in its county, and only in its county. It follows that different rates may be established in and for these different counties,—indeed, as we shall show, different rates ought to be so established. But, as complainant's business is necessarily a unit, the reasonableness of any one of these rates cannot be determined without considering also the rates in the other counties.

When the rates here in question were fixed for Stanislaus County, the Supervisors of Fresno and Merced Counties had not fixed any rates,—indeed, have not yet fixed any, doubtless awaiting instruction from this Court as to the law. Therefore the rates originally fixed by complainant itself prevailed in the latter counties during the period we

have mentioned, while, in Stanislaus County, complainant was limited to those so fixed by the Supervisors of that county.

If the rates for complainant's whole canal were fixed by a single body and at one time, there would be no difficulty in ascertaining the facts as to the operation of those rates. But where, as here, the rates have been fixed in only one county, it is not possible to do that, without some assumption as to the rates to be fixed in the other counties. The reasonableness of the rates already fixed in the one county cannot be affected by what may *actually* be done hereafter in the other counties; and yet each of the other counties may, at any moment, fix rates, which, when taken together with those already fixed in the third county, may produce an unreasonable result.

For these reasons, we think that this act does not furnish such a method as would protect the constitutional rights of such a company, and is, therefore, not due process of law as to it.

There is, however, one, and, we think, only one, way in which this act might be reconciled with constitutional requirements. If we should assume that the Supervisors of Fresno and Merced Counties will fix such rates as they ought to fix, in justice to their inhabitants as well as to the company, we could then examine the rates now in question, in connection with those assumed rates, and then ascertain what would be the result of those rates in actual operation. If such an assumption is not permissible, then we think that the act is, for the reasons suggested, unconstitutional.

We will, then, see what the result would be in this case on such an assumption.

It is, of course, perfectly fair to assume that the Supervisors of these other counties will fix the rates as low as they lawfully can. Without at all impeaching their good faith and uprightness, we cannot forget that the consumers are their constituents, and that they may be, as is often the case, consumers themselves. It is not to be presumed that they would be any more liberal toward complainant than the Supervisors of Stanislaus have been; and we therefore have a right to suppose that, in the absence of any authoritative judicial decision to the contrary, they would not fix the rates any *higher* than those now under consideration. Indeed, the defendants themselves, in the court below, discussed the case solely on that theory; and they considered that they had established their case when they showed (what is true) that these rates, if applied to all three of the counties, would allow complainant an income of substantially six per cent. on $337,000, the amount fixed by the Supervisors as the value of complainant's plant. But while, as we have said, we may justly presume that *higher* rates would not be fixed in those counties, it by no means follows that we have not an equal right to presume that those rates would be *lower,* if there is any legal reason why they should be lower. We believe that we can show, beyond question, that, in law and justice, the rates in the counties of Fresno and Merced *ought* to be lower than those in the county of Stanislaus. If so, we cannot suppose that the Supervisors will be so unmindful of the interests of their constituents as

not to give them the benefit of the distinction to which they are so entitled.

The evidence in this case shows that the value of the works used and useful in supplying water to the inhabitants of Stanislaus County, and the cost of their maintenance and operation, are much greater than is the case of the other counties. That being so, the rates in those counties ought to be, and presumably will be, proportionally lower than those in Stanislaus County. The evidence shows that, if such rates should be so established, complainant's gross income would be less than the necessary cost of maintenance and operation; and that, even on the most favorable theory which defendants can suggest, complainant's net annual income could not possibly exceed 3 $^{6}/_{10}$ per cent. on $337,000.

The facts shown by the evidence applicable to this question are as follows:

The canal of complainant was, in 1874, constructed from its head in Fresno County to Los Banos Creek in Merced County, a distance of 38½ miles. (P. 69.) In 1878, an extension of the canal, called Extension A, was constructed to Orestimba Creek in Stanislaus County, a distance of 29 miles. (Pp. 70-71.) This extension was constructed (at complainant's cost) on the urgent request of farmers living along its route. (Exhibits 18, 19, 20, 21, pp. 391-396.) In 1881, a further extension of 3¾ miles in Stanislaus County, was also constructed at the expense of complainant. It is called Extension B, and brings the canal to its present terminus. (Pp. 70-71.)

Complainant also constructed, in 1879, 1883, and 1885,

three "Parallel Canals," forming a continuous canal 27 miles in length. That canal is constructed on the lower side of the main canal,—the lower bank of the main canal forming the upper bank of the parallel canal,—and its purpose is to enable water to be supplied to the consumers in Stanislaus County, while water is, at the same time, being supplied to consumers in Fresno and Merced Counties. (Pp. 70-71.)

A branch canal, called the "Dos Palos Branch" was constructed in 1894 in Fresno and Merced Counties, which supplies water only in those counties. (P. 71.)

A map of this system of canals will be found between pages 462 and 463 of the transcript. On that map, the direction of the flow of water is from right to left.

The lengths of the different parts of the canal supplying water to Stanislaus County, according to the answer and defendant's witness Goodwin, (which is the view most favorable to defendants,) are as follows (pp. 17, 187):

Whole length of canal	97.94	miles
Length of main canal	71.17	"
" " parallel canal	26.77	"
" in Stanislaus County	11.70	"

The value of these canals is substantially uniform throughout their entire length, and the value of the parallel canal is 0.182 of the whole. (Testimony of C. E. Grunsky, omitted in printing.)

The average number of acres irrigated in Stanislaus County is 7,658, and in all the counties taken together, 40,533. (Pp. 325-6 and Ex. 11, pp. 402-444.)

In the operation of this great length of canal through an arid and porous country, there is a great loss of water by evaporation and seepage; so that, of any given quantity of water turned into the canal, only 0.75 can reach a consumer in Stanislaus County, and, on an average, only 0.875 can reach one in Fresno and Merced Counties. (Pp. 116-122.)

With these facts known, we submit that it is easy to determine, under the act of 1885, what should equitably be the proportional rates as between these different counties; and, on the principle that equity will consider that as done which ought to be done, we are entitled to examine the results of the rates which have actually been fixed in Stanislaus County, on the assumption that the rates in the other counties will bear toward them a due proportion.

The basis on which water-rates are directed, by the act of 1885, to be fixed, is "the value of the canals * * * "and all other property actually used and useful to the "appropriation and furnishing of such water." In fixing these rates in any one county, it is obvious that only those portions of the canal and works which are actually used and useful in furnishing water *to that county* can be taken as the basis for those rates. It follows, then, that, in fixing rates for either Fresno or Merced County, that portion of the canal lying in Stanislaus County can not be considered, for it is neither used nor useful in supplying water in either of the former counties. In adjusting the proportional rates, as between the three counties, the method of fixing the basis is obviously, therefore, to charge the lowest county with the whole of that part of the canal which lies within that

county, and with a ratable proportion of the part lying in the counties above it. It should be charged with the whole of the portion solely within it, because that portion is used wholly for its benefit; and it should be charged with some proportion of the canal above it, because the latter is used partly, but not entirely, for its benefit.

The only equitable method of determining the proportion of the canal in the upper counties, which should be charged to the lower county, is to ascertain the relative use made of the canal by each county; which can only be in proportion to the quantity of water used by each. As the rates here in question are fixed at a certain price per annum for each acre irrigated, the proportion between the counties will therefore be according to the relative number of acres irrigated in each.

But, in fixing such rates, the relative loss of water should also be considered. For every cubic foot of water delivered in Stanislaus, it is necessary to turn into the canal 1.33 feet; while, to supply one foot in Fresno or Merced, only 1.14 feet, on an average, need be turned in. In other words, every acre irrigated in Stanislaus requires that much more water than is required to do the same work in the other counties.

From these considerations, it is evident, at a glance and without any calculation, that the rates in Fresno and Merced must be proportionally very much lower than those in Stanislaus. That is sufficient for our case; for, since the rates now in question, if applied *equally* to all three counties, can afford to complainant a net return of only six per

cent. per annum on the value fixed by the Supervisors, which is the least return guaranteed us by the Act of 1885, any material deduction from those rates in the other counties will unlawfully deprive us of that return.

Nevertheless, in order to put this matter beyond doubt, we calculated what, on this evidence, these proportional rates should be, on every assumption or theory that can be suggested; and we now present to the Court those calculations, which were also presented to the court below. In making those calculations, for convenience and as the result in this case would be the same, we have treated Fresno and Merced counties as one, and have thus calculated what the rates in those counties would be on an average.

In order that every theory should be considered, we have prepared four calculations, each based on a different assumption. In calculation 1, we have assumed that the entire parallel canal should be charged to Stanislaus, and have taken no account of the loss of water. Calculation 2 is made on the same assumption, but taking account of the loss of water. In calculation 3 we have assumed that the value of the parallel canal is to be apportioned between the three counties in the same manner as the main canal, and we have not considered the loss of water; while in calculation 4, made on the same assumption, the loss of water has been allowed for.

Those calculations are as follows:

"COMPLAINANT'S CALCULATIONS OF THE AVERAGE RATE FOR IRRIGATION PER ACRE WHICH SHOULD PREVAIL IN FRESNO AND MERCED COUNTIES, (CONSIDERED TOGETHER,) IF THE RATE IN STANISLAUS COUNTY WERE FIXED AT $1.50 PER ACRE, AND OF THE PROFITS TO BE REALIZED BY COMPLAINANT AT THOSE RATES.

These calculations are made upon the following assumptions:

1. That, on an average, 40,533 acres are irrigated from complainant's canal, of which 7,658 are in Stanislaus County.

(The number of acres irrigated in Stanislaus County was as follows:

In 1896,	Orestimba Section	6,441	
	Las Garzas "	96	6,537
" 1897,	Orestimba Section	6,278	
	Las Garzas "	123	6,401
" 1898,	Orestimba Section	9,865	
	Las Garzas "	170	10,035

and the total number of acres irrigated in the three counties was as follows:

In 1896	37,311
" 1897	37,132
" 1898	47,155)

2. That the number of miles of canal is as follows:

Whole length of canal	97.94	miles
Length of main canal	71.17	"
" of parallel canal	26.77	"
" in Stanislaus County	11.70	"

3. That the value of the main canal per mile is uniform throughout its entire length, and that the value of the parallel canal is 0.182 of the whole.

4. That, of each cubic foot of water flowing into the head of the canal, only 0.75 reaches the consumers in Stanislaus County, and, on an average, only 0.875 reaches the consumers in Fresno and Merced Counties.

5. That, as between the different counties, (Fresno and Merced being averaged together for convenience,) the relative rates should be based upon the principle that each should pay according to the relative cost of delivering the water, as follows:

(a)—The consumers in Stanislaus County should be charged with the entire cost of constructing and maintaining the canal in that county, with the entire cost of constructing and maintaining the parallel canal, and with such a proportion of the cost of constructing and maintaining that portion of the main canal in the other counties as the irrigated acreage in Stanislaus County bears to the total irrigated acreage; and only the remainder of the cost should be charged to the consumers in the other counties;

or (b)—The cost should be charged as in (a), except that the cost of the parallel, instead of being charged wholly to Stanislaus County, should be apportioned in the same man-

ner as that portion of the main canal in Fresno and Merced Counties;

and (c)—The rates should be in inverse proportion to the amounts of water respectively received and not lost.

Of the following calculations, numbers one and two are based upon assumption 5 (a), and numbers three and four upon assumption 5 (b). In numbers two and four, account is taken of assumptions 4 and 5 (c), in the others not.

CALCULATION I.

Of the total number of acres irrigated, the amounts in the respective counties bear the following decimal proportions:

In Stanislaus County	0.189
" Fresno and Merced	0.811
	1.000

The total length of canal being 97.94 miles, and the cost of the parallel being 0.182 of the whole, the equivalent value of the parallel will be 17.82 miles.

The number of miles solely chargeable to Stanislaus County, and the number of miles to be apportioned between the different counties, will then (on assumption "a") be as follows:

Mileage belonging to Stanislaus alone	11.70 + 17.82 = 29.52
Mileage to be apportioned between all counties	71.17 — 11.70 = 59.47
Total	88.99

Or in the following decimal proportions:

To Stanislaus 0.332
" all counties 0.668
1.000

The share chargeable to Stanislaus of the canal in the other counties, on assumption "a", is:

$$0.189 \times 0.668 = 0.126252$$

The total share of Stanislaus is therefore:

$$0.332 + 0.126252 = 0.458252$$

And of the other counties:

$$0.811 \times 0.668 = 0.541748$$
$$1.000000$$

In other words: The consumers in Stanislaus, taken collectively, should be charged with 0.458252 of the whole cost, and those in the other counties, taken collectively, with 0.541748.

The relative rates per acre are determined by dividing the foregoing figures by the respective acreage proportions, as follows:

For Stanislaus ..... $\frac{0.458252}{0.189} = 2.425$

" Fresno and Merced. $\frac{0.541748}{0.811} = 0.668$

If then, the rate in Stanislaus should be $1.50 per acre, the rate -R- in the other counties, taken together, will be determined by the following proportion:

$$2.425 : 0.668 :: \$1.50 : R$$
and $R = \$0.41$

At these rates, the gross receipts would have been as follows (Ex. 11):

In 1897,	6,401 acres at	$1.50	
	30,731 " "	$0.41	.... $22,201.
In 1898,	10,035 " "	$1.50	
	37,120 " "	$0.41	.... 30,271.
			$52,472.

And, (Ex. 3,)

Cost of maintenance in 1897 ...	$19,940.87	
" " " " 1898 ...	29,526.51	49.467.

Net receipts for the two years..... $3,005.
Average per year ..... $1,502.
Or less than one-half of one per cent. on $337,000.

CALCULATION II.

The foregoing calculation shows that, disregarding the loss of water, the rates in the different counties should bear the following proportions:

Stanislaus 2.425
Fresno and Merced c.668

These rates should be increased in proportion to the loss of water, according to the following proportions:

0.75 : 1 :: 2.425 : 3.233
0.875 : 1 :: 0.668 : 0.763

Then, with $1.50 as the rate in Stanislaus, the rate in the other counties will be:

3.233 : 0.763 :: $1.50 : $0.35

At these rates, the gross receipts would have been as follows:

In 1897	$20,357.
" 1898	28,044.
	$48,401.
Cost of maintenance as above	$49,467.
Net *deficiency* for the two years	$ 1,066

CALCULATION III.

If we proceed in accordance with assumption "b", calculation one will be modified as follows:

Mileage chargeable to Stanislaus	11.70
" " " all counties	
71.17 + 17.82 − 11.70 =	77.29
Total	88.99

Or in the following decimal proportions:

To Stanislaus	0.131
" all counties	0.869
	1.000

Then the share of Stanislaus will be:

$$0.131 + (0.189 \times 0.869) = 0.295241$$

And of the other counties:

0.811 × 0.869 =	0.704759
	1.000000

Then the rates per acre will be:

For Stanislaus ..... $\frac{0.295241}{0.189} = 1.562$

" Fresno and Merced. $\frac{0.704759}{0.811} = 0.869$

And, at $1.50 in Stanislaus, the other rate will be:

1.562 : 0.869 :: $1.50 : $0.83

At these rates, the gross receipts would have been as follows:

In 1897	$35,113.
" 1898	45,862.
	$80,786.
Maintenance as above	49,467.
Net receipts for the two years...	$31,319.
Average per year	$15,659.

Or 4 $^{6}/_{10}$ per cent. on $337,000.

CALCULATION IV.

Applying the factor of loss of water to calculation three, we have (as in calculation two) the following:

0.75 : 1 :: 1.562 : 2.083

0.875 : 1 :: 0.869 : 0.993

and

2.083 : 0.993 :: $1.50 : $0.72

At these rates the gross receipts would have been as follows:

In 1897	$31,733.
" 1898	41,779.
	$73,512.
Maintenance as above	49,467.
Net receipts for the two years	$24,045.
Average per year	$12,022.

Or 3 $^{6}/_{10}$ per cent. on $337.000."

Of these calculations, No. 2 shows that the proportional rate in Fresno and Merced (that in Stanislaus being taken at $1.50) would be $0.35, causing an annual *deficiency* in complainant's gross income, below the annual expense of $533. That calculation is based on the theory most favorable to complainant.

Calculation 4, the one most favorable to defendants, shows that the rate in Fresno and Merced would be $0.72; which would allow a net annual income of only 3$^{6}/_{10}$ per cent. on $337,000.

Calculation 2 is, we submit, strictly according to the testimony; but we think that a consideration of the map shows that the testimony as to the use and purpose of the parallel canal is probably not quite correct. That map shows that the parallel canal terminates in Merced County, some 17 miles above Stanislaus County; and it is therefore probable that it is of *some* use in Merced County. If that be so, calculation 2 may be somewhat too favorable to com-

plainant. On the other hand, even in that case, calculation 4 must be far too favorable to defendants. We believe that, if further testimony had been taken, the truth would have appeared to lie somewhere between the results of those two calculations, but much nearer to calculation 2.

But, however that may be, either one of the four calculations shows, that whatever theory may be adopted, these rates do deprive complainant of the lowest compensation to which, under the law, it is clearly entitled; and that the decree was therefore correct, even if the basis adopted by the Supervisors should be taken to be the proper one.

VI.

COMPLAINANT HAS NOT BEEN GUILTY OF ANY UNJUST DISCRIMINATION.

1. It was charged in the answer (p. 19) that complainant annually permits Miller & Lux, (alleged to be a firm, but which is a corporation,) which is the largest stockholder of complainant, to irrigate many thousands of acres of its land, from complainant's canal, free of charge.

It was shown that Miller & Lux owns a little more than one-half of complainant's stock; but otherwise no proof whatever was offered in support of that allegation, and it need not be further considered.

2. The answer also alleged, in the same paragraph, that complainant is accustomed to furnish water to Miller & Lux at one-half the rate charged to other customers, which

acts resulted in great loss of revenue to complainant, and a corresponding injury to the other customers.

The evidence on which defendants relied in support of that allegation, was as follows:

On May 18, 1871, Miller & Lux (then a copartnership) entered into a contract (Exhibit 4, p. 380) with the San Joaquin & Kings River Canal Company, complainant's grantor and predecessor, of which corporation Miller & Lux were not stockholders. For reasons that will hereafter appear, it is not necessary to state the terms of that contract, further than to say that Miller & Lux promised, on certain conditions, to pay the canal company a subsidy of $20,000, and to give it a right of way over their lands.

On February 7, 1872, Miller & Lux entered into an agreement with complainant, (Exhibit 5, p. 383,) by which the previous agreement was canceled by mutual consent. It was recited that Miller & Lux had already paid $13,333 of the subsidy previously agreed, (which was retained by the company,) and they agreed to pay the further sum of $6,666.66 on certain conditions (which were never performed). They further agreed to grant to the company a right of way for its canals through all their lands in Fresno, Merced and Stanislaus Counties, (which covered by far the largest portion of complainant's canal,) and to grant them certain other privileges in connection therewith. Complainant, on its part, agreed that the price which Miller & Lux should pay "for water furnished by it, used in "irrigating each crop, the regular price paid by others for "irrigation, not to exceed $1.25 per acre."

At that time, Miller & Lux owned only a trifling amount of complainant's stock.

Disputes thereafter arose between the parties as to the true construction of that contract, which resulted in litigation. To settle those controversies, the trustees and stockholders of complainant agreed to a compromise, (pp. 166-7,) in pursuance of which a new contract (Exhibit 6, p. 387,) was entered into on November 12, 1879. By that contract, Miller & Lux agreed to give the company a deed for the right of way previously agreed upon, which should convey a width of 100 feet on each side of the canal. It was further agreed that the clause of the former contract, heretofore stated, as to the price of water, should be construed to mean that the company should deliver to Miller & Lux water, "at its regular rates not exceeding $1.25 per acre per "crop, provided the crops are cut; but in case the alfalfa "lands should be pastured, then each supply of water of the "usual quantity supplied to produce a crop shall be "deemed to be such a supply as will entitle a charge to be "made therefor, the same as if a crop shall be cut." It was, however, agreed that Miller & Lux should be entitled to that rate only on 33,333 1-3 acres, and that that right should not pass to their grantees.

When that contract was executed, Miller & Lux had acquired a controlling interest in complainant's stock; but other stockholders, owning some 27,000 shares out of a total of 100,000, assented in writing to that agreement.

That contract has been followed ever since; and Miller & Lux pay thereunder, for the irrigation of alfalfa, $1.25 for each crop raised by them.

It will thus be seen that these contracts were entered into for valuable considerations. Miller & Lux paid $13,333 in money, and conveyed a large amount of land; and, as will be seen hereafter, gave another and still more valuable consideration, namely: the right to take, from the San Joaquin River, sufficient water to supply the company's consumers,—a right which, under the law of California, the company could obtain only by purchase from Miller & Lux, who were riparian owners, or by judicial condemnation and payment. As no evidence was offered to show that these considerations were not adequate or that the contract was in any respect unfair, there can be no doubt that this contract was a proper one,—such contracts being valid under the law of California.

Fresno Canal & Irrigation Co. v. *Park,* 129 Cal. 437;
San Diego Flume Co. v. *Souther,* 104 Fed. 706;
Souther v. *San Diego Flume Co.,* 112 Fed. 228.

Such being the case, we are unable to see what *possible* injury these contracts could work to the other consumers. If the consideration was adequate, (which, in the absence of any evidence to the contrary, must be deemed to be the fact,) these contracts could not affect them. By this arrangement, the company obtained its water, and the greater portion of its right of way, without charge, and received, in addition a sum of money. But for that arrangement, the cost of the construction of the works and the acquisition of the water, would have been that much more, and the rates would have been correspondingly higher. The other

consumers, therefore, received the full benefit of the consideration, and cannot be heard to complain, even if Miller & Lux received a benefit thereby.

But, in fact, there is no evidence to show that Miller & Lux do obtain any advantage. The regular rates, both those fixed by complainant and those fixed by the Supervisors, consist of a yearly sum of money, for which the company furnishes all the water which the consumer requires to irrigate his land throughout the entire season, no matter how many crops he raises. (P. 122.) Usually, they raise from three to five crops annually, irrigating for each crop. (P. 329.) By these contracts, Miller & Lux pay, for irrigating *each crop,* one-half of the regular annual rate. If, then, they raise only one crop, they pay one-half of the full annual rate; if two crops, the full amount of that rate; and if three or more, they pay a *greater* amount per annum than any one else. The only advantage they obtain, then, is that, if they think it better to raise only one crop annually, and therefore require only one irrigation, they do not have to pay for two irrigations. The other consumers think it better to have three or more irrigations in a season; and the Supervisors, in fixing these rates, have followed that practice. It therefore does not lie in the mouths of defendants to say that Miller & Lux receive any unfair advantage over them.

3. Defendants also complained, in the court below, of another contract (Exhibit 22, p. 396) made December 24, 1897. As that contract was made long after the fixing of these rates, and after the commencement of this suit, we fail to perceive how it can be considered.

In any event, however, that contract certainly contains nothing unfair. It merely placed a construction (undoubtedly the true one) upon the preceding contract, namely, that Miller & Lux are to pay "for each crop irrigated, or "for water furnished of the usual quantity supplied to pro- "duce a single crop, one-half of the regular rates per sea- "son," not exceeding $1.25 per acre per crop.

4. The other contract on which defendants rely, is Exhibit E, page 399, which was made May 18, 1899. As that contract was made long after this case was at issue, it can, of course, cut no figure here.

But what defendants appear really to rely on are the *recitals* in that contract, which, they claim, furnish evidence to support the allegation in the answer concerning the use of free water by Miller & Lux. We cannot adequately state those facts without transcribing the material portions of that contract, which are as follows:

> "Whereas, prior to the construction of the canal of the party of the first part, Henry Miller and Charles Lux were the owners of lands lying along and bordering upon the San Joaquin river, and its sloughs, in said State, and lying above and below the head of the canal of the party of the first part, and were the owners of riparian rights in and to the waters of said river and sloughs, and had been accustomed to and did actually use the waters of said river and sloughs which naturally overflowed said lands, and also to take water therefrom by artificial means, for the purpose of irrigating said lands and furnishing water for their cattle and live stock, and for other domestic uses, in accordance with their said riparian rights;
>
> "And, whereas, said Henry Miller and Charles Lux, for the purpose of aiding the construction of said canal of the party of the first part, did pay to the party of the first part a subsidy in money,

and conveyed to it a right of way for its said canal where the same passed through the lands of said Henry Miller and Charles Lux of a width of one hundred (100) feet on each side of the center line of said canal, and permitted the party of the first part to appropriate and divert from said river through said canal eight hundred (800) cubic feet per second of the water flowing in said river;

"And, whereas, at all times since said appropriation was made by the party of the first part, said Henry Miller and Charles Lux and said Henry Miller, as the survivor of them, and the party of the second part (as the successor in interest of said Henry Miller and Charles Lux) continued, as said riparian owners, to use the overflow waters of said river and sloughs upon said lands for the aforesaid purposes, and also to use, for the purpose of irrigating uncultivated land, and furnishing water for their live stock and for other domestic uses, and with the consent of the party of the first part, and without any charge therefor by it, the surplus water running in said canal not used or required by the water-consumers of the party of the first part other than said Henry Miller, Charles Lux, and the party of the second part;

"And, whereas, during all said times it was understood by all said parties that said Henry Miller and Charles Lux, and said Henry Miller, as the survivor of them, and said party of the second part, as the successor in interest of them, were of right entitled to the said use, without charge, of the said surplus water in said canal; and that said party of the first part was of right entitled to waste said surplus water on said uncultivated lands;

"And, whereas, the party of the second part has agreed to permit the party of the first part to appropriate and divert from said river through its 'outside canal,' three hundred and fifty (350) cubic feet per second of the water flowing in said river, in addition to the aforesaid eight hundred (800) cubic feet per second;

"Now, therefore, in consideration of the premises, and to the end that the rights of the respective parties hereto, as heretofore understood and recognized, may be fixed and established, the party of the first part does hereby confirm unto said party of the second part the right to use, for the purposes of irrigating the said uncultivated lands above referred to, and of furnishing water for its cattle

and live stock, and for other domestic uses, free of cost or charge to it, all or so much of the surplus water running in the canals of the party of the first part as the party of the second part may desire to use for said purposes, and which may not be used or required by the other water-consumers of the party of the first part; and said party of the second part does hereby confirm unto said party of the first part the right to waste said surplus water on said uncultivated land.

"And the party of the first part does hereby acknowledge and declare that it has no claim to make against the party of the second part, or its predecessors in interest, on account of the use heretofore made by it and them of said surplus water."

This contract was nothing but a formal recognition, by complainant, of the unquestionable rights of Miller & Lux,—and, indeed, it gave them less than their legal rights.

By the law of California, no one has, as against a riparian owner, the right to divert *any* water whatever from the stream; and even a riparian owner has no right, as against another riparian owner, to divert any water from the stream and carry it upon *non-riparian* lands.

Lux v. *Haggin,* 69 Cal. 255;
Heilbron v. *Fowler Switch Canal Co.,* 75 Cal. 426, 431;
Gould v. *Eaton,* 117 Cal. 539.

The consent of Miller & Lux that complainant might divert water into its canal and carry it upon non-riparian lands, was merely a consent that complainant might take so much water as should be needed by its customers; and, indeed, complainant, as a mere appropriator, had no right to take any more. Whatever additional water complainant takes, at any time, is the property of Miller & Lux; and, if

it is turned upon the lands of the latter, complainant is not entitled to any compensation therefor. On the other hand, complainant cannot, in justice to its consumers, strictly limit itself to taking only so much water as will be actually used in irrigation. The demand necessarily varies, and complainant ought, therefore, to keep enough water in its canal to supply any probable demand; and it cannot, without great damage, ever allow its canal to become dry. It frequently results, therefore, that water is left in the canal, after supplying all the wants of the consumers. The company can lawfully do nothing with that water, except to turn it back into the stream; and the consent to Miller & Lux that it may be set free on its land, cannot confer upon the company any right to exact compensation for it.

This contract is, therefore, fair and just, and rather beneficial than injurious to the other consumers; and the practice thereby sanctioned, and which has always existed, is a proper one, and can not affect rates.

It should be further remarked that, if this practice were injurious to the other consumers, it would be even more injurious to the stockholders other than Miller & Lux. Yet the evidence (pp. 172-177, 183) shows that, after the fullest investigation, this contract was prepared and concurred in by trustees representing these outside stockholders only, and was expressly ratified by those stockholders personally. It is not likely that they would have done so, if they had believed that Miller & Lux were thereby acquiring any advantage; and they had the best opportunity of knowing whether that was so or not.

The foregoing portions of this brief contain our argument on the points made in the court below and available to defendants on the printed record here. We have prepared it in the light of the arguments in that court, of course being unable, in the absence of any brief from appellants, to anticipate any new argument which they may make on those points in this Court. We shall now proceed to make such suggestions as occur to us as to the points which counsel inform us they intend to make in this Court,—so far, at least, as the outline furnished us by counsel indicates their purport. Some of them are not intelligible to us, and we shall be compelled to omit any reference to them, nor shall we touch on those which are sufficiently covered by what we have said above.

VII.

REPLY TO APPELLANTS' POINTS.

1. THE COUNTY AND ITS BOARD OF SUPERVISORS ARE PROPER AND SUFFICIENT PARTIES DEFENDANT TO THIS SUIT.

Counsel claim that, because the state statute does not impose on the Supervisors any duty as to the *enforcement* of the rates fixed by their ordinance, the validity of that ordinance can be determined only in a suit between private persons.

The question so indicated is, so far as we are aware, a new one. Such suits, under this and similar statutes, have been frequently maintained without suggestion that they were improper or that decisions in them would bind no one. Such

a case was *San Diego Land Co* v. *National City,* 174 U. S. 739; and such a case was *Spring Valley Water Works* v. *San Francisco,* 82 Cal. 286. In the latter case,—in which, as here, only the County, its Board of Supervisors, and the members of that board, were defendants;—a decree, precisely like the one now appealed from, was affirmed.

But a question depending upon precisely the same principles, was presented to the Circuit Court for the Southern District of California, in the case of *San Diego Land Co.* v. *Jasper,* 110 Fed. 702, 712. In that case, (which was brought under this very statute,) the Supervisors were made defendants, and there were also joined as defendants the 25 persons upon whose petition the Board had acted. The latter persons made default; whereupon the complainant contended that they were the real parties in interest, and that the complainant was, upon their default, *ipso facto* entitled to a decree against *all* the defendants. The court ruled against that proposition, and said:

> "Each and every person to whom the rates fixed apply—*in other words, the public*—is interested in the question; *and the representative of this public in the matter is the board of supervisors,* each member of which was by the complainant made a party defendant to the suit. * * * This practice has been uniformly sanctioned and held to be proper." (Citing a number of cases.)

Among the cases so cited by the learned judge, (himself a high authority on California law,) is *Railway Co.* v. *Minnesota,* 134 U. S. 418. In that case, Mr. Justice Miller said, in his concurring opinion (p. 460):

"Until the judiciary has been appealed to to declare the regulations made, whether by the legislature or by the commission, voidable [for unreasonableness], the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals. The proper, *if not the only,* mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of just compensation for the service rendered. Until this is done, *it is not competent* for each individual having dealings with the carrying corporation, *or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.*"

This language was quoted by the full bench, in the case of *St. Louis & San Francisco R. Co.* v. *Gill,* 156 U. S. 649, 659, and was so quoted with approval, except that the Court pointed out that such a method could not be followed where the rates had been fixed directly by the legislature; and the Court said (p. 666):

"Sometimes, in acting on this subject, the state legislatures have created commissions or boards of public works, with power to *establish* rates * * * and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed: that the remedy for a tariff alleged to be unreasonable

should be sought in a bill in equity or some equivalent proceeding, *wherein the rights of the public* as well as those of the company *can be protected.*

"But there are other cases, * * * where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, *because there is no public functionary or commission which can be made to respond.*"

Those cases obviously proceed on the theory that the rights to be protected against the company, are the rights of *the public,* and that the public ought therefore to be represented. That is unquestionably the true position under the California act of 1885. Under that act, and under the express terms of the ordinance here in question, (p. 460,) the rates are fixed for any water furnished "to the inhabitants" of the county. The powers of the Supervisors are set in motion (sec. 3) by a petition of twenty-five "inhabitants" of the county, who may or may not be consumers of water. When the board acts, and after it has acted, it cannot be known what individual inhabitants will be affected by its action. The right conferred by the statute is, therefore, strictly a *public* one;—indeed, it is only that fact which confers upon the State any right to fix rates at all. That being so, a bill in equity to determine the validity of the ordinance can not be maintained against a merely private individual, nor against any person not representing *the public*; and unless the county or the board does represent the public in this matter, no bill can be maintained at all.

We submit that, in such cases, the governing body of a county or municipality does represent the inhabitants of the county, in all matters which relate to them as such, whether that body is or is not specially charged with the judicial enforcement of their rights. Mr. Freeman, in section 178 of his work on Judgments, says:

> "The position of a county or municipal corporation towards its citizens * * * is, upon principle, analogous to that of a trustee toward his *cestuis que trust,* when they are numerous, and the management and control of their interests are by the terms of the trust committed to his care. A judgment against a county or its legal representatives, in a matter of general interest to all its citizens, is binding upon the latter, though they are not parties to the suit."

The learned author then proceeds, in that section, to give the reasons for that proposition, on principle and on authority, so fully, that we need add nothing to what is there said; and we submit, for those reasons, that this suit was properly brought against these defendants.

We will add that this point, though raised by the demurrer and the answer, was never brought to the attention of the court below, either on the argument or otherwise; and that we are therefore not informed of the reasons which appellants intend to urge in support of it.

2. THIS BILL STATES A SUFFICIENT CASE IN EQUITY, FOR COMPLAINANT HAS NO "PLAIN, ADEQUATE, AND COMPLETE REMEDY AT LAW", WITHIN THE MEANING OF SECTION 243 OF THE REVISED STATUTES.

This point, also, though made in the demurrer, was never brought to the attention of the court below.

On general principles, this point needs no argument, as this case does not differ from any of those heretofore decided by this Court.

But we are informed that counsel claim that such a remedy is furnished by the act of 1885, by allowing complainant to apply to the Supervisors to fix new rates. Section 5 of that act provides that "The said rates, when so fixed by "such Board, shall be binding and conclusive for not less "than one year next after their establishment." Complainant, therefore, could obtain *no* remedy from the Board, as to that year; and, as there can be no presumption that it would act differently a second time, such a supposed remedy is no remedy at all. But the words "remedy at law," as used in section 243 of the Revised Statutes, mean, of course, a remedy in a *court* of law; and counsel's objection, therefore, can have no force.

3. THE STATE STATUTE OF MAY 14, 1862, UNDER WHICH COMPLAINANT WAS INCORPORATED, IS NOT IN CONFLICT WITH THE CONSTITUTION OF THE STATE.

We understand that appellants will contend that that act is void, under the provisions of section 31 of article IV of the state constitution of 1849, in that, by its terms, it is made inapplicable to certain counties. This point was not raised, in any manner, in the court below; and it is therefore entitled to but little consideration here,—if, indeed, appellants can be heard to make it at all.

(*a*) We think that appellants are estopped, by their answer, from now questioning the validity of that act in this particular. That objection goes to the act as a whole; and, if well taken, it would entirely defeat complainant's incorporation and deny it any standing in court. The bill alleges (p. 1) that complainant was incorporated under the provisions of the act of April 14, 1853, (Cal. Stats. 1853, 87,) which did not authorize the formation of such corporations, "as amended by" this act of May 14, 1862, by which act only could such a corporation be formed. That allegation was admitted by the answer (p.15); and defendants are therefore in no position to deny the due incorporation of complainant. But the effect of the point now, for the first time, raised by them, would be that there was no law of the state under which complainant could be incorporated,—thus contradicting their answer. We submit that they cannot be permitted to do this.

(*b*) The act in question remained in full force for more than ten years; during which period complainant, and many other similar companies, were incorporated under it, and it was the only act for the incorporation of companies for such a purpose. Though repealed in 1873, it has ever since, as we have shown, continued to be the law as to corporations formed under it. Yet its constitutionality has never before been questioned in any court, State or Federal, nor has the question now sought to be raised been presented to any court as to any statute. Under such circumstances, such a point ought not to be made, for the first time, in this Court, after

a long and costly trial had upon the assumption that the act was entirely valid.

(*c*) This provision of the state constitution,—that "cor- " porations may be formed under general laws, but shall not " be created by special act,"—has a well understood signification. It forbids the legislature to pass an act creating a particular corporation, or conferring upon any particular corporation, as such, any privilege, or imposing upon it any duty, which is not conferred or imposed upon all corporations of the same character. So far as we are aware, no court has ever held that this provision goes any further.

This act, therefore, is not obnoxious to this objection. It authorizes the formation of corporations for a particular purpose; and all its provisions apply, and apply equally, to all corporations to be formed for that purpose. Why, then, is it not a general law, within the meaning of this constitutional provision? In the absence of any knowledge as to the grounds on which counsel mean to base their objection, we can do little more than to ask that question.

This section of the constitution of 1849 is the only one in that constitution which at all forbids special acts; and the courts of the state have given it only the construction we have stated. In 1879, it was replaced by the present constitution of the state, in which (art. IV, sec. 25) minute provisions were made against "*local* or special laws." Those provisions were such as to require new definitions by the courts; but, even under those provisions, as so defined, the act in question could not be held to be "special." Even under the present constitution, the rule laid down by the Supreme Court of

California is, that an act operating uniformly upon the whole of any single class, when the classification is founded upon some natural or intrinsic distinction, is a general law.

Abeel v. *Clark,* 84 Cal. 226, 229;
Cody v. *Murphey,* 89 Cal. 522;
People v. *Central Pacific R. Co.,* 105 Cal. 576;
Murphy v. *Pacific Bank,* 119 Cal. 334, 341;
Rode v. *Siebe,* 119 Cal. 518;
Vail v. *San Diego,* 126 Cal. 35;
Murphy v. *Pacific Bank,* 130 Cal. 542, 550.

The objection now under consideration is founded upon the fact that, by section 5 of the act of 1862, it is enacted that the provisions of that act "shall not apply to the Counties of "Nevada, Placer, Amador, Sierra, Klamath, Del Norte, "Trinity, Butte, Plumas, Calaveras, and Tuolumne." The counties so named are the mountain counties of the state, in which, at that time, the sole business was mining, and in which, even at this day, only very small portions are adapted to agriculture. The legislature may well, therefore, have considered that the portion of the state, so excepted, was not adapted to such a system of canals as was created by the act. Water, it is true, was used in those counties for mining; but corporations for mining purposes were allowed by the act of 1853, and the legislature may have deemed the provisions of that act more suitable to such a territory. But it is not necessary to know what were the actual reasons which influenced the legislature. It is sufficient, as was said in *People* v. *Central Pacific R. Co., supra,* (p. 585) that there is a natural classification "which will *suggest* a reason which

"*might* rationally be held to justify the diversity in the legis-
"lation," and which is made "for the purpose of meeting
"different conditions naturally requiring different legisla-
"tion."

Even under the present constitution of the state, then, this act would be held valid.

But the case is still stronger under the constitution of 1849. That constitution did not forbid "local" laws; and the word "special," as there used, must be read, in view of the context, as meaning special only as related to corporations. Under it, no corporation could be specially created or endowed; but, so long as all corporations of the particular kind should be treated alike, there was nothing to prevent the legislature from forbidding such corporations in a particular part of the state. Such legislation is, on general principles, within the unquestioned competence of the legislature; and unless *expressly* forbidden by the constitution, must be held valid. He who denies such a power, must show clearly and beyond a doubt that the constitution has deliberately denied it to the legislature. We cannot conceive that appellants can successfully do so here.

4. COMPLAINANT SUFFICIENTLY PROVED THE COST OF ITS CANAL, AND THE EXPENSE OF MAINTAINING IT.

Complainant (p. 55) produced in evidence all of its books of account, and the papers and vouchers relating thereto, and also those of the former corporation, its grantor. By stipulation of the parties, (p. 457,) it was agreed that these books might be omitted from the transcript of the record on this appeal, and that the tabulations made therefrom, and made

exhibits in the cause, correctly represent the contents of those books. It was further stipulated (p. 459) that there was evidence to show that those books were correctly kept, and (pp. 464-5) that that evidence might be omitted in printing.

Those books, so proved, were competent evidence of the facts contained therein.

2 Jones on Evidence, §§ 323, 324, 325, 326, and authorities there cited.

Complainant's exhibits 2 (p. 401), 3 (p. 402), and 12 (p. 445), which are so admitted to be correct, do show the matters here in question, with at least sufficient certainty for all the purposes of this case; and we are not informed what objections appellants have to urge as to them.

5. THE CONSTRUCTION OF PLAINTIFF'S CANAL WAS NOT EXTRAVAGANT.

The point now made by appellants was made in the court below, and much evidence was taken concerning it. At the request of the then solicitor for the appellants, and upon his assurance that this point would not be made in this Court, we entered with him into a stipulation, (pp. 464-5,) that that testimony need not be printed, and that that stipulation should be taken as a substitute for the proceedings provided for by subdivision 9 of rule 10.

The testimony on this subject, so omitted in printing, and which is contained in the original written record filed in this Court, is the following:

Testimony of	M. L. Stangroom,	page	219.
"	" J. Q. Drummond,	"	286.
"	" C. H. Barrett,	"	291.
"	" A. H. Rose,	"	304.
"	" W. S. Chapman,	"	736.
Complainant's Exhibit	7,	"	960.
"	" 8,	"	971.
"	" 15,	"	989.
"	" 16,	"	999.
"	" 17,	"	1001.

Also complainant's books of account before mentioned.

The above was the evidence before the court below on this point. Whether there is any evidence in the printed record, which might possibly bear on this point, we do not know; but, if so, it is merely incidental to other matters.

We submit that this case, like any other, should be argued on the evidence which was before the trial court, and that a party who causes material evidence on any point to be omitted from the printed record, should not be heard here on that point.

6. COMPLAINANT'S FARMING OPERATIONS DO NOT AFFECT THIS CASE.

It is true that, for the purpose of illustrating the methods and value of irrigation to a people then not experienced in that matter, complainant at one time operated a farm, and that that experiment was an unprofitable one. But no part of the cost of those operations is included in any of complainant's statements of the cost of the construction or main-

tenance of the canal and works, nor in any way relied on by us. That matter, therefore, has no relevancy here.

7. THE ESTIMATE OF THE VALUE OF COMPLAINANT'S CANAL MADE BY THE ASSESSORS FOR THE PURPOSES OF TAXATION, IS NOT EVIDENCE OF THAT VALUE FOR ANY PURPOSE IN THIS CASE.

The valuation, by a public assessor, of property to be taxed, is merely his own opinion. It is, of course, evidence in proceedings founded upon the assessment; but in other cases is mere hearsay, and can be no evidence of value.

2 Jones on Evidence, § 300;
Flannigan v. *Althouse,* 56 Iowa, 513;
Tuckwood v. *Hanthorn,* 67 Wis. 326, 336;
Adams v. *Hickox,* 55 Iowa, 632.

If any such assessments are in evidence in this case, they were introduced for a different purpose, and are not evidence on this question.

8. COMPLAINANT'S REVENUE FROM THE PROPERTY ON WHICH THESE RATES WERE FIXED WAS NOT GREATER, IN 1897 OR 1898, THAN ITS REVENUE BEFORE THE PASSAGE OF THIS ORDINANCE, BUT WAS LESS.

The ordinance in question was adopted June 24, 1896. In September, 1896, (pp. 84-9,) complainant commenced the construction of a new canal, called the "Outside Canal," about 34½ miles long, which supplies water to land not reached by the former canal. This new canal (which is shown on the map) was in operation in 1898 and a part of

it in 1897; and the receipts from water, shown by exhibit 11, include irrigation from a large amount of land irrigated only from that new canal. As the receipts from different canals were not segregated on the books, it is not possible to ascertain how much of complainant's revenue was from the new canal. The aggregate receipts for those years cannot, therefore, be compared with the previous receipts.

As this new canal cost more than $85,000, and, of course, was not included in the Supervisors' estimate of the value of complainant's property, appellants' present point cannot be maintained.

9. COMPLAINANT'S VOLUNTARY REDUCTION OF RATES, PENDING THIS SUIT, CAN NOT BE CONSIDERED HERE.

The evidence shows (p. 122) that, until the validity of these rates could be determined, and while they were in operation in Stanislaus County, complainant voluntarily allowed a reduction of rates to the consumers in Fresno and Merced Counties. This act of courtesy and fairness to those counties cannot, as we have shown, be considered in this case; and, in any event, the circumstances under which it was done deprive it of any significance.

10. THE DIFFICULTY OF DELIVERING WATER IN STANISLAUS COUNTY, DOES NOT SHOW THE REASONABLENESS OF THE RATES.

As that county is at the lower end of the canal, and as the water, at times, is so short that (pp. 121-2) it cannot reach that county without great loss, the consumers in that county are, no doubt, sometimes put to inconvenience. But that is a

necessary incident of their situation, for which complainant is not responsible,—especially as the canal was extended to them only on their earnest importunity. As no one can be required to pay for water which he does not receive, that fact can not affect the rates.

Sometimes, it is true, water is supplied to consumers in Fresno and Merced, to the total deprivation of those in Stanislaus. That, however, is the result of the law, which complainant cannot control. The canal was first built into Fresno and Merced, and was not extended into Stanislaus for many years. Under the law of California, the consumers in Fresno and Merced thus acquired a priority, which complainant is bound to respect.

Merrill v. *Southside Irrigation Co.*, 112 Cal. 426.

Those circumstances, however, are, as we have said, immaterial in fixing rates.

For the reasons in this brief stated, we submit that the decree appealed from should be affirmed.

W. B. TREADWELL,

For Appellee.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1903.

No 80.

THE COUNTY OF STANISLAUS ET AL.,
Appellants,

vs.

THE SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY,
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

By permission of the Court, we subjoin a few remarks as to such matters in appellants' brief as are not covered by our original brief. We will here follow the numbering of the points in appellants' brief.

I—1.

THE COUNTY AND ITS BOARD OF SUPERVISORS ARE PROPER AND SUFFICIENT PARTIES DEFENDANT TO THIS SUIT.

The error in appellants' argument on this point consists in assuming that the "rate-payers" have *private* rights,

which will be affected by this suit, and that they are therefore necessary parties. But, as we showed on page 69 of our original brief, there are no such private rights involved. The word "rate-payers," used by counsel, is unknown to the law. The Act of 1885, authorizing the fixing of rates (Appellants' brief, pp. 16–23), directs the Supervisors to fix rates for water furnished to "the inhabitants" of the county, and to act upon the petition of "twenty-five inhabitants, who "are tax-payers" of the county, and who may or may not be consumers of water. By this ordinance, therefore, no private individual acquired any rights whatever, except as one of *the public*. The right, therefore, is strictly a public one; and, as we said on pages 66 to 70 of our original brief, the Board of Supervisors is the lawful representative of the public as to this matter.

This point was directly decided by this Court in *San Diego L. & T. Co.* v. *Jasper*, 189 U. S., 439,—which case we inadvertently overlooked in preparing our original brief.

The case of *New Orleans Water Works* v. *New Orleans*, 164 U. S., 471, is not in point. The ordinance there in question granted certain franchises to certain designated individuals, *as such;* and *their* rights were therefore private, and no public body could represent them.

I.—2.

COMPLAINANT HAD NO REMEDY AT LAW.

Counsel for appellants evidently overlooked the provisions of Section 5 of the Act of 1885 (Appellants' Brief, p. 20), that the rates fixed by the board remain in force for not less than

one year. (See our original Brief, p. 71.) This suit (Record, pp. 5, 9), was brought within three months after the passage of the ordinance, and therefore nine months before new rates could take effect.

According to counsel's theory, no suit could ever be maintained; for the same condition would exist every time the board should fix rates.

The cases cited by counsel, on page 39 of their brief, have no application. They were cases where the law provided boards of revision of assessment, to whom application could be made *before the assessment could take effect.*

II.—2.

THE CONSTRUCTION OF COMPLAINANTS' CANAL, WITH CAPITAL INVESTED BY ITS STOCKHOLDERS, CREATED A CONTRACT, UNDER SECTION 3 OF THE ACT OF 1862, THE OBLIGATION OF WHICH THE STATE COULD NOT IMPAIR.

Our argument on this point will be found at pages 8 to 11 of our original brief. We do not care to add anything to that argument, except to say that each of the cases cited by us at the foot of page 9 of our brief is directly in point, and that they are not at all as represented by counsel at pages 69 to 77 of their brief. In each of them, it was decided that a provision like this constituted a contract such as is protected by the Constitution of the United States, and that a reserved power to alter or repeal corporate charters did not permit the State to revoke *such* a contract, even though it was contained in the charter. We respectfully request the Court to examine those cases.

We may remark that there is nothing in the State Constitution to prevent the State from entering into a binding and unalterable contract with a corporation, *when formed*, with the same effect as if made with an individual. This particular provision was not, in itself, a contract, but a mere offer. This act contained two separate and distinct things: (1) a provision for the formation of corporations of a certain character, and (2) an invitation to any such corporation to invest its money, after incorporation, in the construction of certain works for the public benefit, under certain guaranties against spoliation by the State. When this offer was accepted and the money so invested, then and not before a contract was created,—a contract as binding as any other. This provision, though contained in an act for the formation of corporations, was entirely distinct therefrom, and might as well have been separately enacted. It therefore constituted no part of a law which, under the State constitution, might be altered or repealed.

We should also remark that, as shown on pages 6 to 7 and 13 to 15 of our original brief, the act of 1885, properly construed, was not intended to affect this contract. That was the construction adopted by the Court below; and appellants' brief does not appear to controvert that proposition.

III.

The evidence shows that the Supervisors gave no consideration to the cost of complainants' works.

The evidence for the petitioners, before the supervisors, was that the cost of now replacing the works would be

$312,358. The expert, it is true, estimated their present cash value at $251,000; but he did so (p. 190), only because, as he said, the canal was depreciated by silting, and by the age of the lumber. He did not, however, pretend that the canal was any less effective or useful on that account; and that matter was therefore immaterial. The Board added $25,000 to the cost of replacement as testified to by him—calling the value $337,000. This addition of $25,000 appears to have been purely arbitrary, and, at any rate, had no relation to the original cost, and was not based on any evidence before the Board. The conclusion of the Court below (p. 48), was therefore correct.

Counsel are in error in saying that we claim anything for depreciation. We have never made such a claim. On the contrary, we admit that any depreciation must be *deducted* from the original cost, in ascertaining the present value. But such a depreciation, in order to be so considered, must be such as renders the works less useful for the purpose intended. Such is not the case here. The evidence shows, without contradiction, that our works are, in every respect, as useful as ever, and are therefore now worth what they cost.

IV.

As to the evidence of the cost of complainants' work.

Counsel are mistaken (p. 87) in saying that this Court held, in *Dow* v. *Beidelman*, 125 U. S., 680, that "what was "paid by a company to its predecessor for property * * * "is *not* satisfactory evidence of the original cost." On the contrary, what the Court held was, that the sum *actually paid*

was better evidence on the subject than the nominal value of the stock and bonds.

On the general proposition, it is evident that complainants' books furnished the best evidence of which the case admitted; and, as the parties have stipulated (Record, p. 459) that these books "were correctly kept," it follows that they *do* show what was "actually expended," and for what it was so expended.

Counsel's statements, on page 89 of their brief, as to what the minutes of complainant show as to the *proper* cost of complainants' works, are seriously misleading. The statement at the bottom of page 157 of the record was made only by an individual stockholder, and expressly on hearsay; and it is certainly not evidence against the corporation. The statement of the president at the middle of page 168, even if evidence at all, obviously proves nothing.

But, as we showed on pages 76, 77 of our original brief, appellants cannot be permitted to urge this matter, in any form, on this record.

Of course, we do not claim, as counsel seem to suppose, that the contributions of the stockholders to the capital are any evidence of the value of the works. We proved what those contributions were, merely for the purpose of showing that the money spent in construction came from the pockets of the shareholders,—thus bringing ourselves within the terms of the Act of 1862.

Counsel's statement at pages 91 and 92 of their brief, that there are 310,000 acres irrigable from complainants' canal, is entirely gratuitous and unwarranted. The testimony to which counsel refer is merely as follows (p. 102):

"Including Miller and Lux and all the settlers, there is about 310,000 or 315,000 acres of land under the canal, below the canal."

Giving that testimony its broadest possible meaning, it only shows that that quantity of land is *low* enough to be reached by water from the canal,—not that the character of the soil or the condition of the surface is such as to admit of successful irrigation, or that all that land is in need of water from this canal. In fact, much of the land is alkaline, very uneven, and practically worthless, and most of the remainder is otherwise irrigated from natural sources. Still less does this testimony show that complainants' works are any more extensive than is required for the needs of the consumers. Such is not the fact. On the contrary, as counsel themselves admit, while there is sometimes more water in the canal than is needed, at other times there is great difficulty in supplying the consumers. There is nothing whatever in this record to show that complainants' works are not properly adapted to the area which they were intended to supply.

V.

NEITHER THE ASSESSORS' VALUATIONS FOR TAXATION, NOR THE PRICES PAID AT SALES OF COMPLAINANT'S STOCK, ARE EVIDENCE OF THE VALUE OF THE WORKS.

On the proposition as to Assessors' valuations, see page 78 of our original brief. It should be noted that, in California, the taxpayer has no part in fixing values, and makes no statement of values.

As to the evidence of the prices obtained at two isolated sales of the stock, it must be noticed that the stock, under California law, is liable to assessment by the directors, and that the total amount of these assessments or calls (pp. 62–3) was $10.15 per share. The amount of all subsequent assessments must, of course, be added to the selling prices, in order to ascertain what was really paid. It therefore cannot be determined from the evidence how much the stock referred to actually cost.

In fact, however ,the price paid at particular sales of stock is not satisfactory evidence of value; indeed, the general rule is that such evidence is not admissible, and we duly objected to this testimony on that ground.

Lastly, even the market value of the stock is no evidence of the cost of the works. The stockholders actually paid in $10.15 per share, or $1,015,000;—indeed, their total net contributions to the capital of the company amounted to $1,050,-067. (Pp. 67, 69, 83). But, whatever they paid in, the cost of construction is known; and, whatever may be the legal basis for fixing rates, the selling price of stock is no criterion.

VI.

As to the effect of the rates complained of.

We need add little to the argument at pages 40 to 57 and 78 to 79 of our opening brief.

On the last line of the second paragraph of page 106 of appellants' brief, there is a miscalculation. The amount there referred to would, according to the record, be about $70,000 instead of about $81,000.

Counsels' table of dividends on pages 116–117 of their brief, if of any importance, shows that the total dividends, in a period of twenty-five years, have amounted to only $390,000, or less than 1½ per cent. per annum on the invested capital, and less than 2 per cent. per annum on the least possible estimate of the cost of the works.

We do not see that counsel's brief has in any respect shaken our argument at pages 40 to 47. The extension of this canal into Stanislaus County was made at the request of the inhabitants of that county and for their sole benefit. They are, by nature, placed in a more unfavorable situation than the inhabitants of the other counties, both by requiring works that the others do not require, with an increased expense of maintenance and administration, and by requiring an additional and proportionally greater amount of water to be carried to them through the other counties. *As between them and the consumers in the other counties* (and that is the only question here), the latter consumers are entitled to, and under this statute will obtain, lower rates than the former. The other counties were first in the field and cannot legally or equitably be deprived of that advantage.

VII.

COMPLAINANT HAS NOT BEEN GUILTY OF ANY UNJUST DISCRIMINATION.

We adhere to what we said at pages 57 to 65 of our original brief. There are two, and only two, ways in which this matter may be viewed as affecting this case. If com-

plainant has been guilty of improper conduct, in relation to the matter in suit, equity will, of course, decline to grant relief. So, even although its conduct may not have been inequitable, still if it has so acted as to voluntarily deprive itself of the revenue to which it would otherwise be entitled, it cannot expect the court to make good that deficiency. Neither of these conditions exists here; and certainly the burden is on the defendants to show that they exist.

It was certainly not inequitable for complainant to make such contracts as it did make, if they were made for adequate considerations, of which the other consumers have received the benefit. Appellants have not proved that those considerations were not fully adequate, or that those contracts were in any respect unfair; and they have therefore failed to show that complainant's hands are not perfectly clean.

Their statement, at page 168 of their brief, that Miller & Lux had not, in fact, used the waste water to irrigate their uncultivated lands, is shown to be incorrect by the very testimony which counsel cite. Miller & Lux, at a certain time, claimed that water *as a matter of right.* On being refused, they deemed it cheaper to buy the control of the corporation, than to litigate the question. The fact that they took that course, clearly does not impugn their right.

Nor does this alleged discrimination, whether lawful or not, affect the case. In the calculations presented on pages 49 to 56 of our brief, we have computed the operation of these rates on the assumption that Miller & Lux are to pay the same rates as all others. Even on that assumption, we

have shown that these rates can afford no compensation to complainant.

We pass over in silence (as the court below did) counsel's unwarranted reflections on the conduct of Miller & Lux. They are entitled to receive no advantage from their control of the complainant corporation; but neither are they, on account of that fact, to be deprived of any of their rights. Confining ourselves, as we may properly do, to the *evidence*, we confidently assert that it contains nothing in any respect derogatory to the complainant or to Miller & Lux. Complainant's dealings have been marked throughout by good faith, and even liberality; and that counsel's position as to this matter is wholly unsupported by the record, is cogently indicated by the fact that the court below did not deem it worthy of notice.

Respectfully submitted,

W. B. TREADWELL,

For Appellee.